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Docket No. Cv F-88-98 EDP.
Decided May 31, 1989.

Standard of review - Notice and comment requirements of the APA - Application of volume restrictions among districts.

The standard of review in a 8c(15)(A) proceeding is whether the Secretary's ruling is in accordance with law. The Secretary's decision may be overturned only if it was arbitrary, capricious or not supported by substantial evidence. The Secretary failed to comply with the notice and comment requirements of the APA when issuing the weekly volume restrictions for oranges. The "good cause" exception is to be employed only when an emergency prevents the agency from conforming with the APA. The AMAA provides that the marketing order may limit amounts which each handler may market under a uniform rule, but it does not require that the allotment must be equal among several districts.

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM DECISION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs commenced this action by petitions filed pursuant to 7 U.S.C. § 608c(15)(A), relating to the Federal Marketing Order regulating the marketing of navel oranges grown in Arizona and designated parts of California. *See* 7 C.F.R. Part 907. It is conceded that plaintiffs are "handlers" of navel oranges as that term is defined in the Code of Federal Regulations. Plaintiffs conduct their business within the State of California.

Plaintiffs enjoyed some success in the original administrative hearings. The Administrative Law Judge granted plaintiff's petition on the three (3) grounds asserted by plaintiffs in their appeal before this court.

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*Clayton K. Yeutter succeeded Richard Lyng as Secretary of Agriculture on February 16, 1989, and should be substituted as defendant in this suit. No further action is necessary to continue this suit, by reason of the last sentence of 42 U.S.C. § 405(g), and Fed.R.Civ.P. 25(d).

The Secretary appealed the decision of the Administrative Law Judge. Judicial Officer Campbell reversed the Administrative Law Judge's decision and dismissed plaintiffs' petition. Plaintiffs now appeal the Secretary's final determination under 7 U.S.C. § 608c(15)(B) which provides in pertinent part as follows:

> The District Courts of the United States (including the Supreme Court of the District of the Columbia [District Court of the United States for the District of Columbia]) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

The hearing officer, in rejecting plaintiffs' appeal, focused in part on the benefit that Sunkist Growers, Inc., a cooperative marketing association of orange growers, obtained from the navel orange order. First of all, the hearing officer pointed out that the Senate report on the 1935 Act recognized that cooperative associations would be reinforced by these provisions.

Next, the hearing officer pointed out that the Supreme Court itself had given its blessing to the provisions of the code, namely that 7 U.S.C. § 608c(12) gave the cooperatives an acknowledged edge in being able to vote on behalf of all of its members.

Further, the hearing officer rejected some of the conclusions that plaintiffs drew from the evidence with reference to the relative strength of District 1 as opposed to District 2.

I. Notice and Comment Requirements of 5 U.S.C. § 551.

Plaintiff's first argue that the Secretary failed to comply with the "notice and comment" requirements of 5 U.S.C. § 551-553.

Section 553 outlines the procedure to be followed in the agency's rule-making process. One court held that regulations issued pursuant to marketing orders promulgated under 7 U.S.C. § 608c are subject to the procedure prescribed by this section. *See Walter Holm & Company v. Hardin*, 449 F.2d 109 (D.C.Cir. 1971). The Navel Orange Marketing Order, i.e., Marketing Order 907, was promulgated in 1953 after the Secretary had given notice and an opportunity for a hearing. The order was submitted to producers and handlers for their approval, and then went into effect. The marketing order

only covers the domestic fresh orange market. Oranges that are subject to export are exempted.

The orange producing area is divided into prorate districts. This division occurred because the Secretary recognized that there are general differences in maturity dates and keeping quality of the oranges grown in the various geographical sections. *See* 7 C.F.R. § 907.66. The production area subject to the order is divided into four (4) districts. The Central Valley of California, and these plaintiffs, are included in District 1.

The marketing order authorizes the Secretary to impose weekly restrictions on the amount of oranges any district may ship. The determination is to be governed by the Secretary's finding that such a quota will effectuate the purposes of the Act. The fact that oranges may exceed the parity price shall not impinge the Secretary's discretion. Finally, the secretary may increase the quota anytime prior to or during the week. *See* 7 C.F.R. § 907.52. Regulation 907.110 provides for an equity factor to be used in determining the quota for each district. The equity factor for each district must be equal. The equity factor is a percentage of an orange tree crop that reflects the number of oranges in each district for which there will be equitable marketing opportunities under the volume regulations for the ensuing season. *See* C.F.R. § 907.110.

A. Secretary's Annual Position Paper

Each year, the Navel Orange Administrative Executive Committee drafts a marketing policy for the ensuing year. The completed draft is presented to the full Navel Orange Administrative Committee at a public hearing. Once the Navel Orange Administrative Committee approves the policy, public meetings are held. If adopted as a result of this public meeting (and it generally is), the policy statement is forwarded to the Secretary of Agriculture. The position of the United States Department of Agriculture is summarized in a position paper that makes broad projections of the volume of oranges that will be subject to volume restrictions, and discusses the information upon which the production projections are based.

In implementing the marketing policy, the Navel Orange Administrative Committee recommends any necessary volume restrictions the week before they are imposed. *See* 7 C.F.R. § 907.51. When the Secretary finds that limiting the quality of oranges that may be handled in each prorate district during a specified week will tend to effectuate the purposes of the Act, the Secretary shall fix such quantity as the quantity of oranges that may be marketed during that week's period. *See* 7 C.F.R. § 907.52.

It should be noted that the Secretary has imposed volume restrictions during each of the growing seasons from 1974-75 through 1984-85.

The scope of review in these cases was defined in *Prune Bargaining Association v. Butz*, 444 F. Supp. 785, 790 (N.D.Cal. 1975), *aff'd.*, 571 F.2d 1132 (9th Cir. 1978).

> The jurisdiction granted the court is limited to an inquiry as to whether the Secretary's ruling is in accordance with law. The court is confined to reviewing the record of the Section 608c(15)(A) proceeding; the court can overturn the administrative determination only if it finds the Secretary's decision arbitrary, capricious or not supported by substantial evidence. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied sub nom., Lewes Dairy, Inc. v. Hardin*, 394 U.S. 929, 89 S.Ct. 1187, 22 L.Ed.2d 455 (1969); *Chiglades Farm, Ltd., v. Butz, supra.* This statutorily defined manner of challenging the Secretary's marketing orders and other regulations is expressly limited to handlers, however, ...

Plaintiffs complain that the Secretary violated the requirements of the Administrative Procedure Act governing informal rulemaking by promulgating the annual position paper.

Section 553 of Title 5 of the United States Code prescribes the notice and hearing procedures to be applied in rulemaking, and exempts interpretive rules, general statements of policy, or rules of agency organization procedure or practice from its provisions. The Secretary contends that this exemption would serve to eliminate the need for notice and hearing of the issuance of the position paper. A reading of the position paper reveals that the statements contained therein merely express the Secretary's expectations for the crop yield for the coming year. The position paper acts only to protect the up-coming crop and the factors which may influence the market. Announcements are based solely on estimates. They do not set the equity factor, the prorate basis, or the shipping schedules. The underlying marketing order, on the other hand, which was adopted after notice and hearing, provides that the volume restrictions may be implemented to effectuate the purposes of the Act.

The marketing regulations provide that the Secretary possesses total discretion to judge the annual shipments, as well as to choose each week whether to impose volume regulations. *See* 7 C.F.R. § 907.52. A reading of the position paper reveals that it simply announces the Agency's tentative plans for the future. Indeed, the judicial officer specifically found that the weekly shipping policy found in the Navel Orange Administrative Committee's marketing policy is rarely identical to the volume regulation promulgated by the Secretary for any given week.

The mere fact that the Secretary used volume restrictions in almost every season since the order was promulgated, does not mean that he is mandated to do so. The recognition that volume restrictions might be implemented in a growing season does not in any way infringe the Secretary's discretion to use them or not to use them. The Secretary is free to impose them or not.

B. Weekly Volume and Shipping Regulations.

Plaintiffs next argue that the weekly regulations that control the volume of crop to be shipped into the open market, are subject to the notice and comment requirement of 5 U.S.C. § 553. They argue that the "good cause" exception to the notice and comment requirement is to be used only when emergencies prevent the Agency from having time to conform to the notice and comment requirements.

In *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982), a panel of the Ninth Circuit observed:

> The notice and comment procedures in Section 553 should be waived only when "delay would do real harm." *U.S. Steel v. U.S. Environmental Protection, supra*, 595 F.2d at 214. The good cause exceptions is essentially an emergency procedure. This court would not permit the Environmental Protection Agency to rely solely on statutory deadlines to satisfy the good cause exception in enacting clean air standards. *Western Oil & Gas v. United States, E.P.A.*, 633 F.2d 803, 810-813 (9th Cir. 1980). *Accord: State of N.J. v. U.S. Environmental Protection*, 626 F.2d 1038 (D.C.Cir. 1980); *U.S. Steel Corp. v. United States Environmental Protection, supra, Sharon Steel Corp. v. Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979).
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> > "When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decision-maker should be vigorously enforced. This we believe is sound policy . . ." *Western Oil & Gas v. United States, E.P.A.*, 633 F.2d at 813.

The judicial officer's answer to plaintiffs' argument that the weekly volume restrictions were improperly and routinely exempted from the provisions of 5 U.S.C. § 553 is answered beginning at page 79 of the Findings of Fact and page 190 of the General Discussion. The judicial officer demonstrated by chart that the practice engaged in by the Navel Orange Administrative Committee did not allow for the notice and comment provisions of 5 U.S.C. § 553 to be implemented. Starting at page 190, the judicial officer discussed the activities of Mr. Pescosolido, a principal of one of the plaintiffs in this case. Unfortunately, this discussion is wide of the mark. It does not come to grips with the provisions of the section and the purposes of the congressional mandate.

The Court is aware that from time to time, conditions will arise that make it important for the prorate quotas to be tested on short notice, i.e., weather conditions which limit the number of oranges that may be shipped; rain conditions which make harvest impossible or impractical. However, as

pointed out by the judicial officer's decision in this case, the practice is constant, and no attempt has been made to limit the practice to those cases where intervening forces of nature make it imperative that the regulations be issued without the necessity or possibility of public comment.

In *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983), the Circuit Court had occasion to analyze substantively the basis for claims for good cause. In that case the Court stated:

> We also analyzed the three bases the statue provides for a claim of good cause; impracticability, lack of necessity, and the public interest, 4 U.S.C. § 553(b)(B)(1982). Impractibility was said to exist when the agency could not both follow section 553 and execute its statutory duties. *See* 619 F.2d at 145. Public procedures are "unnecessary," we concluded, when the regulation is technical or minor. *See id.* Finally, "'[p]ublic interest' supplements the terms 'impracticable' or 'unnecessary'; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest rule-making warrants an agency to dispense with public procedure."

It appears that the judicial officer's determination on this point is not in accordance with law.

II. The Department's Unequal Application of Volume Restrictions, vis-a-vis, District 1 and District 2.

Finding twenty-two (22) of the judicial officer's decision states that in the 1982-83, 1983-84. and 1984-85 seasons, District 1 was subject to volume restrictions while no comparable restrictions were placed on Districts 2, 3 and 4. During some of the other seasons under consideration, volume restrictions were started later in Districts 2, 3 and 4 and ended earlier in Districts 2, 3, and 4 than that of District 1.

Section 608c(6)(C) of Title 7 of the United States Code provides that the marketing order may limit amounts which each handler may market under a uniform rule based upon the amounts which each handler has available for current shipment. This section was interpreted in *American Fruit Growers v. United States*, 105 F.2d 722, 726 (9th Cir. 1939) as follows:

> By 7 U.S.C. § 608c(6)(C), the Secretary of Agriculture may, after hearing, either make an allotment, or provide a method for allotment. By Order No. 2, the Secretary provided only a method. The provision of the act merely requires the allotment be made "under a uniform rule." The rule adopted by the Secretary is uniform, in that all handlers are allotted a quality by the same method or rule. The "uniform rule" is required to be "based upon the amounts which each

> such handler has available for current shipment." It is apparent, we think, that the rule had such a basis, for it was based upon the amounts which each such handler had available for current "seasonal" shipment.

Clearly then, the section only provides that the rule used to determine the allotments be uniformly applied. The rule does not require that an allowment must be equal among several districts.

Section 907.110 of Title 7 of the United States Code prescribes the procedure whereby equity of marketing opportunity will be afforded each of the prorate districts. Section A requires the Committee to establish an equity factor which will be the same for all prorate districts. The equity factor shall be stated as a percentage of the tree crop in each district, and shall reflect a quantity of oranges grown in each district for which there will be equitable marketing opportunity. At marketing policy committee for each prorate district, the Committee shall formulate a weekly shipping schedule for the ensuing season, reflecting insofar as practicable the desire of growers and handlers of oranges within the district as to the quantity of oranges grown in that district to be shipped under volume regulations each week. Subparagraph C provides that following each meeting, the Committee may review and make equitable modifications in the equity factor in the weekly shipping schedule. Subparagraph D mandates the timing of the shipping schedule. Subparagraph E delineates the factors which the committee must take into account in making its weekly recommendations. Subparagraph F requires the Committee to make such adjustment as it deems necessary to reflect changing crop or marketing conditions. Subparagraph G requires the committee to make calculations as to the percentage of the total tree crop that will be handled under volume restrictions and to prepare an estimate of weekly shipments based thereon.

In his Findings, the judicial officer demonstrated that taking the figures available for the growing seasons 1974-75 to 1983-84, District 1 shipped 66.30% of its product in the fresh domestic market, whereas District 2 shipped only 33.30% of its product in the fresh domestic market.

During the same period, District 1 shipped 3.80% in the fresh export market, while District 2 shipped 37.30% in the fresh domestic market. It should be noted that export shipments are not included within the calculations for shipment quoted. By a series of tables beginning at page ninety-two (92) covering the 1980-81, 1981-82, 1982-83, 1983-84 seasons, the evidence demonstrates that the seasons start earlier in District 1 and last substantially longer than in District 2. Further, the shipments from District 1 exceeded the shipments from District 2 in the fresh domestic market by amounts from 40 to 1 to 35 to 1. Indeed, the chart would indicate that there is a general decline of production in District 2 as opposed to District 1.

In viewing the foregoing evidence, the Court cannot say as a matter of law that the judicial officer's version of the evidence is incorrect.

III. The Secretary Failed to Engage in Reason Decision Making in Approving the Recommendations of the Navel Orange Administrative Committee.

In their attack on the weekly volume recommendations, plaintiffs rely on the testimony of John Ford, the Deputy Assistant Secretary for Marketing and Inspection Services. Ford testified that he did not have information from which he could determine whether the volume restrictions effectuated the purposes of the Act. However, the judicial officer pointed out that Assistant Secretary McMillan and Assistant Secretary Ford were not involved in promulgating the weekly restrictions. Therefore, the only relevant testimony in the record was the testimony of Mr. Chioffi, the Chief of the Marketing Agreements Section. Chioffi was the United States Department of Agriculture Marketing Specialist until 1977. As such, he was responsible for receiving the statistical wire from the Los Angeles representative of the Department, analyzing the information and comparing it to prior years, and receiving the information as to what had transpired at the weekly Navel Orange Administrative Committee meetings. This latter information was supplied to Chioffi by telephone call from the field representative. The telephone call would be followed up by a written report that included the Navel Orange Administrative Committee's dissenting views. Chioffi would then obtain price-marketing data and prepare an impact statement summarizing and evaluating the data used. Chioffi was identified by the judicial officer as the only witness "knowledgeable concerning the promulgation of the weekly volume limitations by the United States Department of Agriculture.

The judicial officer noted that although it was a rarity, occasionally the recommendations of the Navel Orange Administrative Committee were not accepted by the Department. However, plaintiffs have failed in their attempt to show that the procedure was somehow flawed in its operation on the orange production allotments.

Conclusion

All of the seasons which have been put in issue have since passed. Plaintiffs have presented no evidence that but for the violation of the notice and comment requirement, the marketing orders would have resulted in different shipping restrictions in the marketing orders. Consequently, plaintiffs have not proven any damage suffered by them.

Accordingly, the Court remands the matter to the Secretary to enter an order requiring the Orange Administrative Committee to comply with the provisions of 5 U.S.C. § 553(b) or, alternately, when the Orange Administrative Committee determines that compliance with that section may be waived, to make findings of fact that justifies a waiver of such requirement as provided in 5 U.S.C. § 553(b)(3)(B).

In re: SAULSBURY ORCHARDS AND ALMOND PROCESSING, A CALIFORNIA CORPORATION; CAL ALMOND, INC.; CARLSON FARMS, A SOLE PROPRIETORSHIP.
AMA Docket No. F&V 981-4.
Order Denying Motion for Reconsideration of Ruling on Certified Question filed January 10, 1989.

Donald A. Tracy, for Respondent.
Brian C. Leighton, for Petitioners.
Order issued by Donald A. Campbell, Judicial Officer.

Petitioners' Motion for Reconsideration of the Judicial Officer's "Ruling on Certified Question" issued on October 27, 1988, which was filed November 14, 1988, is denied for the reasons set forth in the original ruling and in Respondent's Response to Petitioners' Motion for Reconsideration of the Judicial Officer's Ruling on Certified Question. In addition to the reasons set forth in those documents, it would not be in the public interest to take the time necessary to issue a declaratory order in this case in view of the extraordinary backlog of pending cases in the Office of the Judicial Officer.

In re: CONESUS MILK PRODUCERS.
88 AMA Docket No. M-2-75.
Decision and Order filed March 6, 1989.

Milk - Producer liability for reporting errors - Administrator's duty to audit producer reports - Estoppel - Zone transportation differentials - Standard of deference to agency interpretation of regulations - Requirement that petition contain full statement of facts.

Under the New York - New Jersey area milk marketing order, a producer is responsible for the accuracy of its reports. The market administrator is not required to perform audits with any particular frequency. Failure to audit does not estop the administrator from collecting amounts due as a result of past incorrect reporting by a producer. The administrator computed zone transportation differentials according to a reasonable interpretation of order provisions. The existence of other possible interpretations does not render the administrator's reading invalid. If petitioner's purpose is to challenge the validity of the marketing order, the petition is deficient in its failure to contain a full statement of facts.

Gregory Cooper, for Respondent.
John F. Vorrasi, for Petitioner.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(a)). It was instituted by a petition filed on November 7, 1988, by the Conesus Milk Producers ("Petitioner"). A motion to dismiss was filed on December 22, 1988, by the administrator for the Agricultural Marketing Service ("Respondent"). An answer to the motion was filed by petitioner on January 24, 1989.

Petitioner, an agriculture cooperative, is a handler operating as a bulk tank unit carrier. Petitioner protests a demand by the market administrator that petitioner make payments for certain unpooled milk that it had shipped. It also contends that an interpretation of the milk order[1] by the market administrator concerning charges for zone differentials should be modified as not in accordance with law.

After careful review of all the documents filed in this case, I find that there are no material facts in dispute and that a decision can be made on the basis of the documents now on record. For reasons that follow, respondent's motion to dismiss is granted.[2]

The first issue presented by petitioner concerns the payments demanded by the market administrator. It stems from milk from farms which petitioner had carried and reported as pool milk. This particular milk, however, had not been delivered to pool plants. The farms producing this milk, therefore, were not "producers" and the milk was not otherwise "qualified" under the order. Petitioner, however, who handles milk that has primarily Class II utilization, nevertheless received excess utilization payments for this non-pool milk from the producer settlement fund for the period March 1986 through May 1987. When the administrator later discovered this error, he sought repayment from

petitioner and the administrator should be "estopped from enforcing a penal provision by its own conduct."

Petitioner contends that section 1000.3(c)(7) places an affirmative burden on the market administrator to conduct prompt and accurate audits of petitioner's field conditions and records and to furnish prompt corrections to petitioner. It argues that the market administrator's failure to properly discharge these duties "lulled" the petitioner into inactivity concerning its error.

Section 1000.3(c)(7), referred to by petitioner, is the part of the regulations relating to "General Provisions of Federal Milk Marketing Orders." It provides that the market administrator "shall perform all the duties necessary to administer the terms and provisions of each order under his administration, including, but not limited to, the following:

* * * *

> "(7) Prescribe reports required of each handler under the order. Verify such reports and the payments required by the order by examining records . . . by examining such handler's milk handling facilities; and by such other investigation as the market administrator deems necessary for the purpose of ascertaining the correctness of any report or any obligation under the order . . . ."

The foregoing section does command the market administrator to prescribe reports and examine a handler's (petitioner's) records and facilities to determine the "correctness" of a handler's obligations under the order. However, it does not state the frequency with which these particular functions must be performed,[3] nor does it absolve a handler of blame for any errors in the handler's reporting that may be discovered when an examination or audit is conducted.[4]

Thus, contrary to petitioner's assertion, section 1000.3(c)(7) does not require the market administrator to conduct frequent audits of petitioner's records and operations. This section, moreover, does not modify or change in any respect the longstanding policy of the Secretary that the burden of reporting is on the handler and that "the extent of auditing necessary to verify reports is largely a matter of discretion with the market administrator." *Hygienic Dairy Company*, 9 Agric. Dec. 693 (1950). The error in petitioner's

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[3]Petitioner suggests that the frequency of audits is implied in section 1000.3(c)(8) which directs the administrator to provide handlers with prompt monthly statements. This section, however, is inapplicable as it refers only to current statements of a handler's account, not to audits or examinations.

[4]Petitioner's obligation to make monthly reports is contained in Section 1000.5.

reporting was therefore caused by petitioner and not by any lack of audits or examination by the administrator.

Petitioner's contention that the administrator is estopped from collecting the payments caused by petitioner's error is likewise not a well-founded argument. Estoppel is applicable only when the government (the administrator in this case) has engaged in an affirmative misrepresentation or an affirmative concealment of a material fact. *U.S. v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978). The administrator here clearly did not engage in any such misrepresentation or concealment. And even assuming the administrator was required to conduct more frequent examinations or audits than he did, this would not constitute an affirmative act of misconduct warranting estoppel, since "[I]t is not the failure to do something which may lead to estoppel against a government agency; the conduct complained about must be an affirmative act." *Oki v. Immigration and Nat. Service*, 598 F.2d 1160 (9th Cir. 1979). "It is well settled that mere neglect of duty, government employee negligence, and government failure to advise, are concepts that do not constitute affirmative misconduct." *U.S. V. Nez Perce County, Idaho*, 553 F. Supp. 187, 192 (U.S.D.C. D. Idaho).

The administrator, therefore, is not estopped from collecting the payments made to petitioner from the settlement fund because of petitioner's erroneous reporting. Petitioner, in short, owes the fund for the payments it should not have received and the administrator is not, in the circumstances here, prevented from collecting those payments from petitioner.

The second issued raised by petitioner is the contention that it was improperly charged $498,130.26 because of what "it believes" were incorrectly determined zone transportation differentials for the Class I and Class II milk that it transported between January 1985 and June 1988. Petitioner contends that, although most of the milk it carried went into Class II utilization, only Class I zone differential charges were used in determining petitioner's monthly obligation to the milk pool. It alleges that "all milk in the order, regardless of its utilization, is charged with the Class I rate as a means of subsidizing the transportation of Class I milk to the plant." Petitioner argues that this alleged impropriety was caused by the market administrator's incorrect interpretation of sections 1002.70(c) and 1002.51(d) of the order. It does not, however, allege any facts directly challenging the legality of the order itself.

Section 1002.70 provides generally for the method to be used in computing a handler's (petitioner's) "net pool obligation." Section 1002.70(c), cited by petitioner, provides for additions, or deductions, to the computation according to the zone in which the plants are located:

> (c) Deduct, in the case of each plant or unit nearer than the 201-to-210 mile zone and add, in the case of each plant or unit farther than the 201-to-210 mile zone, the sum obtained by multiplying the quantity of pool milk received from dairy farmers by the differential in Column

B of § 1002.51(c) applicable at the plant and weighted average Column B differential computed pursuant to § 1002.51(d) applicable to the unit.

Section 1002.51(d), referred to in section 1002.70(c) and cited in part by petitioner, provides for the following method for determining differential rates:

(d) The differential rate applicable to each pool unit or partial pool unit shall be computed each month as follows: Multiply the volume of pool milk received from farms in each zone by the rate for that zone as set forth in the schedule in paragraph (c) of this section, add the resulting values for all zones of the unit, divide such sum by the total volume of milk received by the unit and round to the nearest 0.1 cent. Rates shall be computed separately for Columns B and C of such schedule.

The"schedule" just mentioned refers to a preceding section, 1002.51(c), which has a "freight zone" differential schedule composed of three columns captioned "A", "B", and "C". The "A" column lists the 50 transportation zones (in miles) covered by the order, "B" column contains the differentials (an addition or deduction depending on the zone) for Class I milk for each zone, and "C" contains the differential for Class II milk for each zone.[5] In determining petitioner's net obligation to the milk pool, the marketing administrator, as discussed later, has apparently used the zone differential based on the weighted average of Class 1 milk ("column B differential") as provided in section 1002.70(e). Petitioner disagrees with this method and suggests that a determination of its pool obligation should be based on the difference between the differential for Class I and Class II milk. Petitioner, citing § 1002.70(e) and only that part of § 1002.51(d) which states that "rates shall be computed separately for columns B and C of such schedule," argues that the order makes a "clear differentiation between Class I utilization and Class II utilization in the addition or deduction of the zone transportation differential."

However, the references in section 1002.70(e) to sections 1002.51(d) and 1002.51(c) clearly indicate that these three sections must be read and interpreted together, rather than separately, to determine how this part of the order is to be implemented. Thus, although section 1002.51(d), as petitioner points out, states when read separately that transportation zone differentials are to be computed separately for Class I and Class II milk, this section when

[5]A review of this schedule shows that the differential for Class II milk for each class is less than the differential for Class I milk in each zone, which would, as petitioner points out, significantly affect the charges to a bulk milk carrier depending on how zone transportation differentials are determined. In petitioner's situation, the average transportation differential for Class I milk is .136, while the average differential for Class II milk is .033.

read together with the provisions in the other sections also leads to the interpretation that it is the "weighted average" of Class I milk - as provided for in section 1002.70(c) and then determined under column B (Class I milk) in section 1002.51(c) - which is to be used in determining petitioner's net pool obligation under the order.

This is the interpretation the market administrator apparently made when he implemented the order through what are called "Bulk Tank Unit Reports," copies of which are attached to the petition. Schedule A of these monthly reports lists the number of producers being serviced by petitioner and the volume of milk it has handled each month. Schedule B provides for the computation of petitioner's net pool obligation, and schedule C provides for the computation of transportation zone differentials. As required by section 1002.51(d), zone differentials are computed separately in schedule C for Class I and Class II milk, with the results then reported in schedule B (lines 1 and 4). The weighted average for the Class I milk is also computed in schedule C and then included in schedule B (line 8). This weighted average is then used to determine petitioner's net pool obligation for the month (line 10).

The issue presented by the petition is whether this interpretation and implementation of the order by the Market Administration is proper. It is first noted that interpretations of marketing orders by an administrator are entitled to great weight. *County Line Cheese Co., Inc.*, 44 Agric. Dec. 63 (1985). Therefore, as the administrator's interpretation here is presumed to be proper, the burden is on petitioner to show that the administrator's interpretation is arbitrary, capricious, or otherwise legally impermissible. *Borden, Inc.*, AMA Docket No. 126-9 (Sept. 1987). There is no such showing in this proceeding. On the contrary, the administrator read the relevant provisions in the order and came to what, on its face, is a reasonable and lawful interpretation.

Although an argument can be made that the order could be interpreted in the manner petitioner urges, this does not render the administrator's interpretation invalid. If the agency's interpretation is reasonable, it is valid even though another interpretation is possible. *Belco Petroleum v. FERC*, 589 F.2d 680 (D.C. Cir. 1978).

It is not as clear as petitioner contends that the effect of the administrator's interpretation is to "subsidize" the transportation of Class I

But even assuming, for argument's sake, that it does have this effect, petitioner has failed to show that such an effect is not in accordance with law, although it does argue that the administrator's interpretation has caused it to incur greater costs. This circumstance, however, standing alone is insufficient

to show that the interpretation, based on a fair reading of the order, is arbitrary, capricious or unreasonable.[6]

Moreover, if the purpose of the petition is to challenge the order itself, rather than the interpretation, the petition is deficient in its challenge because it fails to plead the full statement of facts required in a section 8c(15)(a) proceeding that would show that the order is not in accordance with law. *Cal-Almond, Inc.*, AMA Docket No. F&V 981-2 (April 1987). Mere assertions of illegality are not sufficient to have a provision of an order declared illegal. *College Club Dairy, Inc.*, 15 Agric. Dec. 367, 373 (1956).

Accordingly, as the petition fails to show either that the market administrator's interpretation of the order or that the order itself is not in accordance with law, it will be dismissed.

Order

The petition is dismissed.

In re: CAL-ALMOND, INC., A CALIFORNIA CORPORATION, AND GOURMET PACKING CO., INC., A CALIFORNIA CORPORATION.
89 AMA Docket No. F&V 981-5.
Order Denying Interim Relief filed March 8, 1989.

Carol C. Priest, for Respondent.
Brian C. Leighton, for Petitioners.
Order issued by Donald A. Campbell, Judicial Officer.

Petitioner Cal-Almond, Inc.'s Application for Interim Relief (and for oral argument thereon) is denied. *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. ____ (July 8, 1988), *reconsideration denied*, 47 Agric. Dec. ____ (Aug. 3, 1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchard & Almond Processing*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048, 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

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[6]See *Borden Inc.*, AMA Docket No. 126-9 (Sept. 1987) pp. 204-275, for discussion generally that a marketing order is not illegal just because the order could be more economically advantageous to handlers.

In re: BELRIDGE PACKING CORP., CECELIA PACKING CORP., SEQUOIA ORANGE CO., INC.
AMA Docket Numbers F&V 907-13, 908-4, 910-9.
Decision and Order issued March 10, 1989.

Purposes of the AMA - Discretionary functions of the Secretary - Burden of proof - Scope of review.

The Judicial Officer affirmed Judge Palmer's order dismissing the petition on the ground that it fails to state a claim upon which relief can be granted. Petitioners contend that the orders regulating Arizona and California navel oranges, Valencia oranges, and lemons, which treat Canada as part of the domestic market subject to regulation, are based on stale hearing records, and that the Secretary was arbitrary and capricious in refusing to hold a hearing to consider changed conditions. The Secretary's determinations not to hold a hearing, not to amend an order, or not to terminate an order, are discretionary, nonreviewable determinations. Assuming the reviewability of the Secretary's determination not to hold a hearing, such a determination is reviewable in district court, rather than here. Assuming that the Secretary's determination not to hold a hearing is reviewable here, the Secretary's decision, based on lack of sufficient industry interest, is not arbitrary or capricious. If a hearing were to be held, petitioners would not be permitted to probe the mental processes of the Assistant Secretary. Marketing orders are cooperative ventures in which the Secretary and industry jointly determine the best marketing strategy. The primary purpose of the Act is to protect the purchasing power of producers, particularly cooperative associations. Petitioners' burden of proof, and the narrow scope of review under the arbitrary and capricious standard, explained.

John D. Griffith, for Respondent.
John C. Chernauskas, for Petitioners.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a proceeding instituted by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Orders regulating the handling of Navel Oranges Grown in Arizona and Designated Part of

Petitioners also contend that the Secretary acted in an arbitrary and capricious manner in refusing petitioners' request to hold a hearing to consider whether Canada should now be treated as part of the export market, in view of changed conditions since the original hearings were held in 1953 and 1958.

On August 31, 1987, Administrative Law Judge Victor W. Palmer (ALJ) (now Chief ALJ) filed an order dismissing the petition on the ground that it fails to state a claim upon which relief can be granted. On March 21, 1988, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] The case was referred to the Judicial Officer for decision on May 17, 1988.

On November 10, 1988, a Tentative Decision and Order was filed proposing an order dismissing the petition, and both sides filed briefs with respect thereto. This Decision and Order is identical to the Tentative Decision and Order, with the addition of notes 4 and 8.

I agree with the ALJ's dismissal of the petition, but I would also dismiss that part of the petition claiming that the Secretary was arbitrary and capricious in failing to hold a hearing for two additional reasons not stated by the ALJ, *viz.*, (i) this is not the proper forum in which to raise such an issue, and (ii) the facts alleged fail to state a case of arbitrary or capricious action. Detailed findings of fact are not necessary, in view of the disposition of this case. The ALJ's brief order dismissing the petition is set forth in its entirety, followed by additional conclusions by the Judicial Officer.

ALJ'S ORDER DISMISSING THE PETITION

The petition filed in this proceeding is hereby dismissed.

The petition was filed pursuant to section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A); the "AMAA"). Petitioners seek a ruling that the Secretary acted "not in accordance with law", when he denied a request to hold a rulemaking proceeding to amend Orders 907, 908 and 910 so as to define Canada as an export market. Petitioners also ask that the three marketing Orders be declared to be "not in accordance with law" because they are based on stale record evidence. In support of the latter contention, petitioners would

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

introduce current data to show that the relevant marketing order provisions require change.

Respondent filed a motion to dismiss the petition because petitioners have failed to state any claim upon which relief can be granted. In their response to the motion to dismiss, petitioners have ignored *In re Sequoia*, 41 Agric. Dec. 1511, 1522 (1982) [, *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983)], and contend that the Supreme Court's pronouncement in *Heckler v. Chaney*, 470 U.S. 821 (1985), concerning non-reviewable agency action is inapplicable in light of the D.C. Court of Appeals' analysis of that decision in *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1 (DCCA, Feb. 24, 1987).

In this proceeding, *Sequoia* is controlling. The Department's stated position in that case, which is not inconsistent with any ruling by any court of law, is unequivocal:

> "Once an order is issued in accordance with law, i.e., adequately supported by the promulgation hearing record and statutory authority, the Secretary's decision not to adopt a proposed amendment or not to terminate the Order is a discretionary nonreviewable function." *Sequoia, supra* at 1522.

In *Lyng*, the D.C. Court of Appeals did employ a narrow interpretation of *Chaney* to conclude that it had not overruled prior decisions allowing court review of agency refusals to institute rulemaking. However, when Justice Scalia wrote for the majority in *ICC v. Brotherhood of Locomotive Engineers*, [107 S. Ct. 2360 (1987)], 65 Ad L.2d 1, 14 (June 8, 1987), the applicability of *Chaney* was expanded to include other agency action. More importantly, *Sequoia* has not been overruled and its express holding that the need for amendatory rulemaking under the AMAA is a form of action committed to agency discretion by law, is binding in this proceeding. Inasmuch as the AMAA has also been consistently interpreted as precluding the introduction of new evidence in a (15)(A) proceeding on the marketing conditions that underlie a marketing order, the petition fails to state a claim upon which any relief may be granted. *See United States v. Mills*, 315 F.2d 828, 836 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

I. Relevant Statutory Provisions.

The following statutory provisions (with emphasis added to the particularly important provisions) are relevant to the regulatory programs at issue here (7 U.S.C. §§ 602, 608c(1)-(4), (6)(A)-(6)(F), (7)(C), (7)(D), (9), (12), (14), (15), (16), (17), (19), 610(b) (emphasis added)):

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress--

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title [which includes fruits], other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title [which includes fruits] as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the

remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, *fruits* (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 *et seq.*] and

standards established thereunder (including refined or partially refined oleoresin). . . .

(3) **Notice and hearing**

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes fruits], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) **Finding and issuance of order**

After such notice and opportunity for hearing, *the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing* (in addition to such other findings as may be specifically required by this section) *that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.*

. . . .

(6) **Other commodities; terms and conditions of orders**

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] order issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon

the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(7) **Terms common to all orders**

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

. . . .

(C) *Providing for the selection by the Secretary of Agriculture*, or a method for the selection, *of an agency or agencies and defining their powers and duties, which shall include only the powers*:

(i) *To administer such order in accordance with its terms and provisions*;

(ii) *To make rules and regulations to effectuate the terms and provisions of such order*;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

. . . .

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

. . . .

(9) **Orders with or without marketing agreement**

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to

such commodity or product thereof, on which a hearing has been held, *the Secretary of Agriculture determines*:

(A) That the refusal or failure to sign a marketing agreem (upon which a hearing has been held) by the handlers (exclud cooperative associations of producers who are not engaged processing, distributing, or shipping the commodity or product there covered by such order) of more than 50 per centum of the volume the commodity or product thereof (except that as to citrus fru produced in any area producing what is known as California citr fruits said per centum shall be 80 per centum) specified therein whi is produced or marketed within the production or marketing ar specified therein tends to prevent the effectuation of the declar policy of this chapter with respect to such commodity or product, an

(B) *That the issuance of such order is the only practical means advancing the interests of the producers of such commodity pursuant the declared policy, and is approved or favored*:

(i) *By at least two-thirds of the producers (except that as citrus fruits produced in any area producing what is known California citrus fruits said order must be approved or favored three-fourths of the producers) who*, during a representative perio determined by the Secretary, *have been engaged*, within th production area specified in such marketing agreement or order, *the production for market of the commodity specified therein, or* wh during such representative period, *have been engaged in th production of such commodity for sale in the marketing area specifie in such marketing agreement, or order, or*

(ii) By producers who, during such representative perio have produced for market at least two-thirds of the volume of suc commodity produced for market within the production are specified in such marketing agreement or order, or who, durin such representative period, have produced at least two-thirds of th volume of such commodity sold within the marketing area specifie in such marketing agreement or order.

. . . .

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with

respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

. . . .

(14) Violation of order; penalty

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) *Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.* He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of

business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) (i) Except as provided in clause (ii), *the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.*

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such

representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided,* That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date

(prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof. . . . The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

. . . .

(19) Producer or processor referendum for approving order

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be

complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. . . .

. . . .

§ 610. Administration

. . . .

(b) *State and local committees or associations of producers; handlers' share of expenses of authority or agency*

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. *The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.*

11. The Secretary's Determinations Not to Hold a Hearing, Not to Amend an Order, or Not to Terminate an Order Are Discretionary, Nonreviewable Determinations.

The Act provides that the statutory provisions "applicable to orders shall be applicable to amendments to orders" (7 U.S.C. § 608c(17)), so the statutory provisions relating to the Secretary's holding of a hearing to issue an order are directly applicable to the holding of a hearing to amend an order.

It is significant that the Act does not provide that the Secretary shall hold a hearing when an order will tend to effectuate the declared policy of the Act, but, rather, when the *"Secretary of Agriculture has reason to believe* that the

issuance of an order [or amendment] will tend to effectuate the declared policy" of the Act (7 U.S.C. § 608c(3), (17) (emphasis added)). Similarly, it is significant that the Secretary is not to issue an order when the order will tend to effectuate the declared policy of the Act, but, rather, when the *"Secretary of Agriculture . . . finds . . .* that the issuance of such order [or amendment] . . . will tend to effectuate the declared policy" of the Act (7 U.S.C. § 608c(4), (17) (emphasis added)). Finally, it is significant that the Act does not provide for the termination of an order or a provision thereof when it obstructs or does not tend to effectuate the declared policy of the Act, but, rather, when the *"Secretary of Agriculture . . . finds* that any order [or amendment] . . ., or any provision thereof, obstructs or does not tend to effectuate the declared policy" of the Act (7 U.S.C. § 608c(16)(A)(i), (17) (emphasis added)).

In view of the wording of the statutory provisions as to these three types of determinations, the Secretary's determinations as to such matters are discretionary and nonreviewable. Accordingly, evidence cannot be received *at an adjudicatory hearing* instituted under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)) relating to the desirability of order provisions, or the need for amendments to (or termination of) order provisions because of changed circumstances, or the need to hold a rulemaking hearing to consider amendments. This principle was recently set forth at length in *In re Sequoia Orange Co.*, 47 Agric. Dec. ____, slip op. at 108-26, 272-73 (Jan. 29, 1988), *appeal docketed,* No. CV-F-88-98-EDP (E.D. Cal. Feb. 18, 1988). *Sequoia* relates to determinations by the Secretary not to amend or terminate order provisions, but it is directly relevant here because those determinations are discretionary and nonreviewable for the same reasons as in the case of determinations not to hold a hearing. Excerpts from *Sequoia* are set forth immediately below, without indentation or quotation marks, as would be customary in the case of quoted material. The end of the *Sequoia* quotation is marked by a heading "**END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.**"

EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

Each of the four petitions filed in this proceeding alleges that the Order is unlawful because it has not achieved (and will not achieve) parity prices (Petition in 907-6 at 12-14; Petition in 907-8 at 7-8; Petition in 907-9 at 5-8; Petition in 907-10 at 12-13). However, the ALJ properly refused to receive evidence as to whether the Order was achieving, or would achieve, parity, stating (Ruling on the Parity Issue, filed Sept. 18, 1985):

> Petitioners have alleged, *inter alia,* that Marketing Order 907 is not in accordance with law since it has not established and maintained parity prices.[1] During the course of prehearing conferences held to

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[1]The parity price of an agricultural product is the dollar-and-cents price that would give farmers the same purchasing power they had in 1910-1914 when prices received and paid by farmers were considered to be in good balance. Parity prices are calculated by the Department of Agriculture at the end of each month on the basis of the prices received by the farmers in the local markets for the average of all classes and grades of enumerated agricultural commodities sold by all farmers in the United States. *See* "Navel Orange Administrative Committee Parity Price - 10/30/73" and "Agricultural Prices - January 1983" at 30, Crop Reporting Board, Statistical Reporting Service, USDA.

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narrow the issues, I informed counsel of my impression that there was a well developed and controlling body of law which might preclude the taking of evidence on this issue and the parties were asked to file memoranda on the subject.

Upon consideration of the memoranda of law filed by the parties, it is hereby ruled that evidence respecting parity shall not be received.

It is part of the stated policy of the Agricultural Marketing Agreement Act of 1937 (the Act) to establish and maintain such orderly marketing conditions for agricultural commodities as will establish parity prices to farmers (7 U.S.C. 602(1)). It also is the stated policy of the Act to protect consumers by "authorizing no action which has for its purpose the maintenance of prices to farmers above the (parity) level." (7 U.S.C. 602(2)).

Petitioners do not contend that handlers have been adversely affected by navel orange prices in excess of parity. But rather that parity prices have not been achieved under Marketing Order 907, and that farmers, and petitioners as handlers selling on commission, have therefore not realized the benefits intended by the Act.

However, "parity" is no more than ". . . a goal toward which the Secretary must strive, rather than the process of setting an objective, fixed price." *Pescosolido v. Block,* [765 F.2d 827, 830 (9th Cir. 1985)]. It is a "public aim" of the Act. *Whittenb[urg] v. United States,* 100 F.2d 520, 522 (5th Cir. 1938).

"Parity" is referred to in the Act as part of its "policy statement," and the establishment of parity prices is merely a "desideratum",[26]

United States v. Mills, 315 F.2d 828, 833 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963).

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[26]"Desideratum" is defined as "something *desired* as essential or needed: something that is *sought for* or *aimed at*" (Webster's Third New International Dictionary, Unabridged 611 (1981) (emphasis added)).

Therefore, the fact that parity prices have not been achieved under Marketing Order 907 does not show that the Order's continued existence is not in accordance with law.

Petitioners Riverbend, Sunny Cove and Belridge clarified that, for their part, they raised the issue of parity prices as part of their contention that Order 907, *as applied*, is not *reasonably calculated* to achieve any of the four stated purposes of the Act. These petitioners further explained that they intend to call expert witnesses to testify about how the Marketing Order has extended the normal marketing season, causing unnecessary fluctuations in supplies and prices, and increased consumer prices without corresponding increases in prices paid farmers on a net acre basis. Evidence of this kind may be of the sort that is inadmissible in a 15(A) proceeding in light of prior Departmental rulings and Court decisions which hold that evidence respecting the desirability of a Marketing Order and underlying policy consideration must first be presented at a promulgation hearing. *See Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511, 1519-23 (1982) [, *aff'd on other grounds*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983),] and the case citations collected therein. Counsel may misunderstand prior rulings respecting the kind of evidence that shall be received at the scheduled hearing, and those rulings shall be reviewed during the telephone conference scheduled for Monday, September 16, 1985.

Petitioners on appeal contest the ALJ's Ruling on the Parity Issue at great length. Detailed discussion of their lengthy arguments is not required since the essence of their position is that it is unlawful for the Secretary to impose volume regulations under the Order when there is no basis for believing that parity prices will be achieved. For the reasons set forth by the ALJ, petitioners are in error. Moreover, an appeal in this case must be filed in a federal district court within the jurisdiction of the Ninth Circuit, and the United States Court of Appeals for the Ninth Circuit has already ruled that parity is merely a "goal toward which the Secretary must strive" (*Pescosolido v. Block*, *supra*, 765 F.2d at 830).

In *Pescosolido*, in holding that the court could not require the Secretary, under the Mandamus Act (28 U.S.C. § 1361), to terminate the California-Arizona Navel Orange Marketing Order because parity prices had only been attained in two instances in the last 13 years, the court stated (765 F.2d at 829-30):

> The Growers assert that the central purpose of the Act is affirmatively to establish parity prices, citing 7 U.S.C. § 602(1), which states that one of its purposes is
>
> > to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.
>
> The Growers contend that over the past thirteen years, Order 907 has failed to obtain parity prices for them in all but two instances. As a result of this failure, the Growers claim that the Secretary has violated section 8c(16)(A) of the Act, 7 U.S.C. § 608c(16)(A), which provides that:
>
> > [t]he Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.
>
> . . . .
>
> The Growers contend that 7 U.S.C. § 602(1) explicitly *commands* the Secretary to achieve parity prices, and that if any marketing order fails to achieve them, he must terminate the order under 7 U.S.C. § 608c(16)(A). Because parity prices have only been achieved in two instances over the past thirteen years, they argue that the Secretary should be compelled to terminate Order 907 and instead permit untrammeled competition in their markets.
>
> It is clear that one of the central purposes of the Act is to establish and maintain parity prices for farmers. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138, 83 S.Ct. 1210, 1215, 10 L.Ed.2d 248 (1963). Unlike the fixed minimum prices which must be established for milk, however, *see* 7 U.S.C. § 608c(5)(A), the Secretary is *not* empowered to fix prices for any other commodities covered by the Act. Instead, he may only employ market controls, *see*

id. § 608c(6), in an effort to "effectuate the declared policy of" the Act. Id. § 608c(4).

The Growers correctly point out that the parity price is easily determined by a statutory formula. *See* 7 U.S.C. § 1301. They concede, however, that the Secretary has discretion over the means used to attempt to achieve this goal. Indeed, the clear language of the Act, which permits the issuance of an order if the Secretary finds it "will *tend* to effectuate the declared policy" of the Act, *see id.* § 608c(4) (emphasis added), indicates that an order may be valid if it has a *tendency* to achieve the goal of parity prices. Thus, the statute reflects congressional understanding of the difficulty in achieving any fixed price merely through the use of marketing controls. Instead, "parity" is a goal toward which the Secretary must strive, rather than the process of setting an objective, fixed price. Although the Secretary is commanded by section 608c(16)(A) to terminate any order which "obstructs or does not tend to effectuate" the Act's policy, this command only applies *after* the Secretary makes findings indicating such a failure.

The pivotal question therefore is whether mandamus may be invoked to compel the Secretary to make such findings. The Growers do not come to grips with this issue, but apparently urge that the district court should make its own findings and require termination of the order if necessary. But that alternative is not available to the Growers. In reviewing an order issued after the Secretary has made the appropriate findings, courts are not generally free to examine evidence outside the Secretary's record. *E.g.*, *United States v. Mills*, 315 F.2d 828, 836 (4th Cir.), *cert. denied*, 374 U.S. 832, 83 S.Ct. 1874, 10 L.Ed.2d 1054, 375 U.S. 819, 84 S.Ct. 57, 11 L.Ed.2d 54 (1963). It follows that de novo findings by a district court clearly would be inappropriate.

Mandamus in these circumstances would essentially permit the Growers to seek reopening of the proceedings they brought pursuant to the Act that have been finally concluded. Indeed, the Growers' claim for mandamus is essentially a collateral attack on the order of dismissal and is an attempt to evade the statutory procedures. Permitting such an attack would allow future plaintiffs continually to protest the validity of an order even after the statutory procedures have been followed merely by claiming a change of circumstance.

If an order is so detrimental to producers' interests, the statute already provides one adequate alternative remedy: a vote of a simple majority of the affected producers will terminate an order. *See* 7

U.S.C. § 608c(16)(B). This, we observe, is less than the two-thirds majority necessary to approve an order. *See id.* § 608c(8)(A), (B).

The court's holding in *Pescosolido* is dispositive of petitioners' parity contentions here. The Secretary, in his 1953 final decision as to the California-Arizona Navel Orange Marketing Order, expressly found that the order would *tend* to establish parity prices. Specifically, he found (18 Fed Reg. 4708, 4709, 4721 (1953)):

> (1) It is concluded that a marketing agreement and order program is needed to regulate the handling of navel oranges grown in the production area to establish and maintain such orderly marketing conditions thereof as will tend to establish parity prices for such oranges.
>
> . . . .
>
> (1) The marketing agreement and order and all of the terms and conditions thereof will tend to effectuate the declared policy of the act with respect to navel oranges grown in the production area by establishing and maintaining such orderly marketing conditions therefor as will tend to establish prices to producers thereof at a level that will give such oranges a purchasing power with respect to parity prices and protect the interests of consumers by (a) approaching the level of prices which it is declared in the act to be the policy of Congress to establish by gradual correction of the current level of prices at as rapid a rate as the Secretary deems to be in the public interest and feasible in view of the current consumer demand; and (b) by authorizing no action which has for its purpose the maintenance of prices to the producers of such oranges above the level which it is declared in the act to be the policy to establish. . . .

Petitioners do not challenge the evidentiary support for the Secretary's parity findings in the promulgation hearing record on which the order is based. That was the only basis upon which petitioners could have properly challenged the Secretary's parity findings. See *Pescosolido, supra*, 765 F.2d at 830.

The Act does not command that an order be terminated or suspended when it obstructs or does not tend to effectuate the declared policy of the Act. Rather, the Act commands that an order be suspended or terminated "whenever he [the Secretary] finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of [the Act]" (7 U.S.C. § 608c(16)(A) (emphasis added)). No court can compel the Secretary to make such a finding. *Pescosolido, supra*, 765 F.2d at 830.

In *In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1519-23 (1982), *aff'd on other grounds*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983), involving the California-Arizona Lemon Marketing Order, referred to by the ALJ in his parity ruling quoted above, I held that once a marketing order is issued on the basis of substantial record evidence, a § 8c(15)(A) hearing is not the proper forum for attempting to force the Secretary to terminate the order because of changed circumstances, and that the Secretary's decision not to terminate an order is a discretionary, nonreviewable function, stating:[27]

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[27]The district court, in affirming, did not reach this issue.

> With their appeal, petitioners have filed an amended petition which does not cure the defects [in their petitions] pointed out by Judge Weber [ALJ]. In fact, the amended petition strongly indicates that petitioners have no complaint *that can be cured in a § 8c(15)(A) proceeding*.
>
> Petitioners raise a number of serious issues, but they can be considered by the Secretary only in his legislative capacity. For example, petitioners allege (Amended Petition 7-9):
>
> > On February 18, 1982, the Office of Management and Budget prepared for the Department of Agriculture a memorandum describing the Agriculture Marketing Orders. A copy of that analysis is attached hereto as Exhibit "C" and made a part hereof. That analysis clearly indicates that the purposes of the Agricultural Marketing Agreement Act of 1937 have not and will not be met.
> >
> > In February 1982, the President transmitted his economic report to Congress. That report clearly indicates that a study by a team comprised of personnel from the Department of Agriculture and a university economist indicated that the Marketing Orders have been used in a way that resulted in significant resource misallocation. Although both the team study and the economic report of the President indicated that there were to be changes in the Marketing Order procedures to curb the supply restrictions resulting from the use of producer allotments, to lessen restrictions on handlers' shipments caused by prorate provisions, to reduce supply restrictions caused by stockpiling of reserves, and to limit the incentives for chronic overproduction, no changes have been made in either the Lemon Marketing Order itself or the enforcement of the Lemon Marketing Order. The fact that the Lemon Marketing

Order does not effectuate the policy of the Agricultural Marketing Agreement Act of 1937 has thus been hidden once again.

The following studies have concluded that there is no longer any actual use or purpose for the Marketing Orders, and as there is no purpose or use for them, in order to effectuate the intent of Congress, the Marketing Orders should be terminated. These studies include the following:

(a) A study completed in 1981 by Agribusiness Associates, Wellesley, Massachusetts, "An Economic Analysis of Volume Controls, California - Arizona Navel Orange Marketing Order,"

(b) A report prepared by the U.S.D.A. and published October 15, 1981, entitled "A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops: Economic Efficiency and Welfare Implications,"

(c) A technical bulletin published by U.S.D.A. in June 1981 (number 471), "Effectiveness of Federal Marketing Orders for Fruits and Vegetables,"

(d) A technical bulletin published in November 1981 by U.S.D.A. Economic Research Service entitled "Economic Effects of Termination of Federal Marketing Orders for California - Arizona Oranges (Number 1664),"

(e) A comprehensive report published by the U.S.D.A. in January 1981 entitled "A Time to Choose; Summer Report on the Structure of Agriculture,"

(f) A doctoral dissertation published in 1980 by Peter K. Thor, University of California, at Davis, entitled "An Economic Analysis of Marketing Orders for the California - Arizona Industry."

Such allegations, and others, present no issue for determination in this adjudicatory proceeding since petitioners do not allege that the Lemon Order is invalid on its face or that substantial evidence in the promulgation hearing record does not support the Order provision and the Secretary's determination that the issuance of the Order will tend to effectuate the declared policy of the Act.

The Act provides (7 U.S.C. § 608c(3) and (4)):

(3) **Notice and hearing**

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) **Finding and issuance of order**

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

It is well settled that the lawfulness of a marketing order must be judged by the facts contained in the promulgation hearing record rather than by facts petitioners would seek to introduce at a § 8c(15)(A) hearing. See *Dairymen's League Cooperative Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949); *Beatrice Creamery Co v Anderson*, 75 F. Supp. 363, 367 (D. Kan. 1947); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 228 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); [*In re Lamers Dairy, Inc.*, 34 Agric. Dec. 1766, 1773-76 (1975), *final decision*, 36 Agric. Dec. 265 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980)]. As stated in *In re Leonberg*, 32 Agric. Dec. 763, 792 (1973):

It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial *de novo* by way of the 8c(15)(A) petition. The Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings, and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding. "To

allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." *United States v. Mills*, 315 F.2d 829, 836 (C.A. 4), certiorari denied, 374 U.S. 832. Accord: *Dairymen's League Cooperative Ass'n v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *In re Terrace Park Dairy*, 12 Agriculture Decisions 1383, 1396-1397 (1953); *Sprague Dairy Co. v. Anderson*, 6 Agriculture Decisions 729 (N.D. Ill.). See, also, *Acme Fast Freight, Inc. v. United States*, 154 F. Supp. 239, 241 (S.D.N.Y.).

This exclusionary rule is necessary to maintain the integrity of the regulatory program. The promulgation of an Order or an amendment thereto is formal rulemaking subject to section 7 of the Administrative Procedure Act (5 U.S.C. § 556), which provides that no rule shall be issued except as "supported by and in accordance with the reliable, probative, and substantial evidence." Section 8c(4) of the Agricultural Marketing Agreement Act (7 U.S.C. 608c(4)) requires that in issuing an Order the Secretary shall find upon the evidence introduced at the promulgation hearing that issuance of the Order will tend to effectuate the declared policy of the Act. The administrative process would be seriously disrupted if the Secretary based his determination to issue an Order upon the evidence before him, while the validity of his determination was later judged upon different evidence. Therefore, any new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative, and not in his judicial capacity.

Petitioners do not allege that the Order provisions on their face create inequity between handlers,[3] but only that because

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[3]*Contrast In re Central Citrus Co.*, 34 Agric. Dec. 1428 (1976), in which the Administrative Committee's regulations were designed to create equity between districts--rather than between handlers--and were, therefore, in violation of the act and Order.

of various facts and circumstances affecting handlers, such as the faster deterioration rate of District 1 lemons, inequity results to District 1 handlers. However, it must be presumed (until proven contrary) that substantial evidence in the promulgation hearing record shows that the present Order produces equity between all handlers under the factual setting revealed in the promulgation hearing record. *See United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184-85 (1935); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). If that evidence is faulty, or if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process--not through a § 8c(15)(A) proceeding.

Once an Order is issued in accordance with law, *i.e.*, adequately supported by the promulgation hearing record and statutory authority, the Secretary's decision not to adopt a proposed amendment or not to terminate the Order is a discretionary, nonreviewable function. *See Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940); *United States v. Wilbur*, 283 U.S. 414, 420 (1931); *Work v. Rives*, 267 U.S. 175, 177 (1925); *Louisiana v. McAdoo*, 234 U.S. 627, 633-34 (1914).

With respect to factual contentions, the (15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record--which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum.

Petitioners also challenge the constitutionality of the Agricultural Marketing Agreement Act of 1937, contending that the Act contains insufficient standards. Although it is appropriate for petitioners to raise constitutional issues in this administrative proceeding (*United States v. Ruzicka*, 329 U.S. 287, 294 (1946)), an administrative agency has no authority to question the constitutionality of a statute under its jurisdiction (*Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 539 (1958); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 248 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974)).

Similarly, in *In re Abbotts Dairies*, 32 Agric. Dec. 318, 381-85, 387 (1973), *rev'd on other grounds*, 389 F. Supp. 1 (E.D. Pa. 1975), *reconsideration denied*, 421 F. Supp. 415 (E.D. Pa. 1976), *aff'd mem.*, 559 F.2d 1207 (3d Cir. 1977),

remanded, 438 F. Supp. 629 (E.D. Pa. 1977), *rev'd and remanded*, 584 F.2d 12 (3d Cir. 1978), I held that the Secretary's decision not to issue a proposed amendment (supported by substantial evidence at a promulgation hearing) is a nonreviewable, discretionary function, because no one can compel the Secretary to find that a particular amendment will tend to effectuate the statutory policy.

Decisions by the Secretary (1) not to issue a proposed amendment to an order (supported by substantial evidence), and (2) not to terminate an order that may no longer tend to effectuate the Act, are both nonreviewable, discretionary functions for the same reason, *viz.*, both functions require the Secretary to find either (1) that the provision will tend to effectuate the policy of the Act (7 U.S.C. § 608c(4), (17)), or (2) that the order (or provision thereof) obstructs or does not tend to effectuate the policy of the Act (7 U.S.C. § 608c(16)(A)), and no one can compel the Secretary to make such findings.

In *Abbotts*, I applied this principle, stating (32 Agric. Dec. at 381-85, 387):

> If the Secretary, in his discretion, relying upon the record *and his total knowledge and expertise*, cannot find that the proposed amendment will tend to effectuate the policy of the Act, then he is not required to issue the amendment regardless of what evidence was presented at the hearing. This same contention has been raised in the past before the Judicial Officer. See *In re Pestel Milk Co.*, 6 Agriculture Decisions 85, 110-11 (1947), affirmed *sub nom. Charles W. Allen v. Brannan*, May 25, 1950 (S.D. Ohio); *In re Belle-Vernon Milk Co.*, 13 Agriculture Decisions 447, 481-482 (1954). As the Judicial Officer held in both cases (13 Agriculture Decisions at 482; 6 Agriculture Decisions at 111):
>
> > While it is true that the finding of the Secretary as to the effectuation of the policy of the act must be on the basis of the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal made, even though supported by evidence, will tend to effectuate the statutory policy.[8]

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[8]This has been the settled and contemporaneous administrative construction of the Act (see, also, Sellers, *Administrative Procedure and Practice in the Department of Agriculture under the Agricultural Marketing Agreement Act of 1937* (U.S.D.A., 1939), pp. 27-35), which is entitled to great weight. *In re Bush Dairy, Inc., supra* [31 Agric. Dec. 1479, 1527-30 (1972), *rev'd sub nom. Carnation Co. v. Butz*, 372 F. Supp. 883 (D.D.C. 1974), *reprinted in* 33 Agric. Dec. 420

(1974)], and cases cited therein; *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 320 (C.A. 3, certiorari denied, 394 U.S. 929.

The purpose of the legislative-type hearings held upon proposed amendments is not to determine in a trial-like fashion which side of an issue has the greatest weight of evidence in its favor. There is no requirement that a proposal be adopted as an amendment merely because its proponents produce the greater weight of evidence at a hearing. "The Government is not aligned against the handlers or any group in an adversary contest." *In re Crystal Lake Dairy Co.*, 8 Agriculture Decisions 1, 4-5 (1949).

Rather, the purpose of the hearing is to allow interested parties to present their views and evidence in order to "educate" the Secretary as to the issues involved.

The hearing process required by the Act was described in *United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 910 (C.A. 7):

> The object of such a hearing [under the Agricultural Marketing Agreement Act] is not only to afford the individuals the opportunity of airing their objections to the proposed scheme of things, but is also to give the administrators the chance of obtaining information which might have been overlooked or otherwise not available to them.
>
> The realities of the situation are clear. In the case of many proposed agreements, hundreds of people may be present at a hearing and every individual would be equally desirous of insuring the maximum protection to his own interests. If the equivalent of court proceedings were granted to each person, or even to groups, the hearing would be unwieldy and not susceptible to a satisfactory conclusion. Obviously, a more workable balance must be struck between administrative efficiency and the protection of individual rights.

In determining not to issue a proposed amendment, the Secretary is purely at his own discretion and can rely upon his own expertise and knowledge, upon evidence from other hearings, or indeed upon no evidence at all. A contrary rule could be possible only if the hearing process upon all amendment proposals met the ideal in which all the sides of an issue were thoroughly and competently presented, and the faults of unsound proposals clearly shown. In reality, those who oppose a proposal often may not appear at the hearing to do so; or if they

appear, their opposition might not be adequately presented. Furthermore, it is not unusual for witnesses at such hearing, which are often multi-issue, to merely speak *for* a proposal they favor rather than also evaluating and stating their positions on other proposals.

Moreover, even at an "ideal" hearing where all sides of the issue were presented by the witnesses, if the Secretary were required to adopt every proposal supported by the evidence, this would drastically curtail or eliminate the value of the Department's expertise derived from thousands of hearings. The witnesses at the hearing, rather than the Secretary, would actually determine whether an order or an amendment should be adopted to effectuate the Congressional policy. This could easily lead to the disruption of the Federal regulatory program through the adoption of unsound proposals.

To avoid such a result, the Department might be reluctant to hold as many hearings as are now held; and it might be forced to present substantial evidence in many hearings in opposition to the industry's proposal so that there would be substantial evidence either way in case the Secretary decided not to adopt the proposal. This would make a farce of the hearing process, and would prevent it from being an important educational tool for the Secretary. None of this is either desirable or required by the Agricultural Marketing Act (7 U.S.C. 608c(3) and (4)).

Moreover, the purely discretionary decision by the Secretary not to issue a proposed amendment is not made reviewable by section 10 of the Administrative Procedure Act. Section 10 provides that administrative action is subject to judicial review "except to the extent that * * * agency action is committed to agency discretion by law" (5 U.S.C. 701). To the extent a determination is committed by law to agency discretion, it is not reviewable under section 10 of the Administrative Procedure Act. *Chernock v. Gardner*, 360 F.2d 257, 259 (C.A. 3). Hence some agency action under a statute may be reviewable and other action under the same statute committed to agency discretion is nonreviewable. "Judicial review under a statute authorizing agency action is not precluded because some of that action may be 'committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). Rather, judicial review is precluded only to the extent that such discretion exists." *Jones v. Freeman*, 400 F.2d 383, 390 (C.A. 8). Under the Administrative Procedure Act, the question is not simply whether the statute commits action to agency discretion, but to what extent. Davis, "Unreviewable Administrative Action," 15 F.R.D. 411, 428.

The determination not to issue a proposed amendment is purely discretionary. In *United States v. Bush & Co.*, 310 U.S. 371, 380, the Court held:[9]

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[9]See, also, *Switchmen's Union v. Board*, 320 U.S. 297, 303; *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 477 (C.A. 9).

> It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin v. Mott*, 12 Wheat. 19; *Monogahela Bridge Co. v. United States*, 216 U.S. 177; *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1. As stated by Mr. Justice Story in *Martin v. Mott*, *supra*, pp. 31-32: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

Similarly, in *Louisiana v. McAdoo*, 234 U.S. 627, 633, the Court held:

> There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government.

The rule of noninterference with administrative discretion was again stated in *Work v. Rives*, 267 U.S. 175, 177, where it was held that courts may not--

> compel or control a duty in the discharge of which by law * * * [the Secretary] is given discretion. The duty may be

> discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them.

It is a well established maxim that a court can compel administrative action, by mandamus or mandatory injunction, only when that action is ministerial. As the Court held in *United States v. Wilbur*, 283 U.S. 414, 420, mandamus will issue--

> only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.

If the action is made discretionary within limits--as where the Secretary has discretion to find that an amendment he issues will tend to effectuate the policy of the Act, but only upon the hearing evidence--then he may be compelled to stay within that limitation. *Work v. Rives*, 267 U.S. 175, 177. But courts have no authority to compel or perform themselves the exercise of a purely discretionary determination. *Danville Tobacco Association v. Freeman*, 275 F. Supp. 350, 351 (W.D. Va.); *Watkins Motor Lines, Inc. v. United States*, 243 F. Supp. 436, 438, fn. 4 (D. Neb.).

. . . .

The Secretary's determination not to issue a proposed amendment fits quite aptly with what the Court said in *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18:

> These are matters on which experts may disagree; they involve nice issues of judgment and choice * * * which require the exercise of informed discretion. * * * The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action. * * * We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought--a remedy long restricted, * * * in the main, to situations where ministerial duties of a nondiscretionary nature are involved.

Thus, the Secretary's determination not to adopt the proposed amendment to reinstitute bracketed pricing in Order 4 is a discretionary one not subject to judicial control.[15]

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[15]This position is not based on the discredited "negative order doctrine" (see *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 143), but on the statutory provisions evincing the Congressional intent to commit unreviewable discretion to the Secretary as to what matters should not be included in an order. See, also, Davis, *Administrative Law Treatise* (1958 and 1970 Supp.), §§ 28.16, 28.17.

Although the district court disagreed with my *application* of the foregoing views to the Secretary's actions involved in *Abbotts* (which I continue to believe was correct), the district court agreed that the Secretary's decision not to make a finding that a proposed amendment (supported by substantial evidence) would tend to effectuate the Act is a discretionary, nonreviewable function. Specifically, the district judge stated on reconsideration (*Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz*, 421 F. Supp. 415, 420 (E.D. Pa. 1976):

> While I agree with the Secretary's interpretation of the statute,[13] I do not agree that bracketing had been terminated prior to the June, 1969, hearing.

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[13]Section 8c(4) of the Act provides:

> . . . . [omission consists of all of § 8c(4)]
>
> Section 8c(17) incorporates the above provision [§ 8c(4)] as a requirement for amendments to orders. I agree with the government that the statute means only that the Secretary cannot take the affirmative action of issuing any order or amendment, unless it is supported by substantial record evidence. It does not mean that merely because a proposed order provision has unopposed supporting evidence in the record, the Secretary's must adopt it. The Secretary's decision not to adopt a proposed order, that is not to change the existing status quo, is committed to his discretion; it is only when the Secretary seeks to change the status quo that judicial review under the substantial evidence test comes into play. In view of the fact that in promulgating milk marketing orders the Secretary normally functions in a rule-making capacity, a construction of the statute so as to require substantial evidence to support the Secretary's refusal to issue an order would play havoc with the administrative process. As the government points out, such a construction of the statute would mean that every time a proposal were offered, no matter how farfetched or

> unreasonable, either the Secretary or others who opposed it would be required to present substantial evidence against it at the hearing or risk having the Secretary's refusal to adopt it set aside by a reviewing court.

Again, in his fourth decision in *Abbotts*, the district judge made it clear tha reviewing courts have no power to compel the Secretary to issue an orde provision, stating (*Abbotts Dairies Division of Fairmont Foods Co. v. Bergland* 438 F. Supp. 629, 632 (E.D. Pa. 1977):

> As my earlier opinion makes clear, district courts have no authority to order the Secretary to adopt any particular milk pricing order; their judicial review function is limited to determining whether an order which the Secretary has in fact adopted is supported by substantial evidence. See 421 F. Supp. at 422 & n. 13.

As stated above, the same principle applies to the Secretary's decision not to terminate the California-Arizona navel orange order, i.e., not to change the status quo. For the foregoing reasons, the ALJ properly refused to receive evidence on whether the order was achieving (or would achieve) parity prices. [Footnote omitted.] The Secretary could not be compelled to terminate the order, even if such evidence were established in this proceeding. [Footnote omitted.]

. . . .

One final word should be said for the guidance of the Department's ALJ's handling similar proceedings challenging marketing order programs. Although the Judicial Officer has repeatedly urged the ALJ's to admit evidence, whenever possible (e.g., *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1223 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)), that principle should only be followed where the issues are to be decided on the basis of the evidence received before the ALJ.

In cases such as the present ones, most of the issues raised by petitioners could only be decided on the basis of the rulemaking record (§ II, *supra*). In § 8c(15)(A) cases, the ALJ's should not permit petitioners to subpoena or introduce evidence relating to the wisdom of the program, or purporting to show that petitioners have been damaged or disadvantaged by activities undertaken in accordance with the provisions of the order. *See United States v. Mills*, 315 F.2d 828, 838 (4th Cir.) ("Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order"), *cert. denied*, 375 U.S. 819 (1963). The validity of an order's provisions can only be attacked, from an evidentiary standpoint, on the basis of the formal rulemaking record--not on the basis of evidence adduced at the § 8c(15)(A) hearing (§ II,

supra). The ALJ's should insure compliance with this vital principle by dismissing any allegation of a § 8c(15)(A) petition that shows on its face that petitioners are going to attempt, in effect, to invalidate an order provision, from an evidentiary standpoint, based on *de novo* evidence to be introduced at the § 8c(15)(A) hearing. As shown in § II, *supra*, "[q]uestions of policy or evaluation of the effectiveness of economic and marketing regulations promulgated pursuant to the Act are not properly raised in this type of proceeding." *Lamers Dairy, Inc. v. Bergland*, No. 77-C-173, slip op. at 7 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, 1648 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980).

END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

Petitioners rely on *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), which holds that the Secretary's refusal to initiate rulemaking proceedings to amend soaring regulations under the Horse Protection Act was reviewable. In addition to the ALJ's discussion of this case (set forth at the outset of this decision), it should be noted that the Horse Protection Act does not have any provision similar to § 8c(3) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(3)), upon which I base my view that the Secretary's refusal to hold a rulemaking hearing under the Agricultural Marketing Agreement Act of 1937 is discretionary and nonreviewable.[3]

In addition, the court, in *American Horse Protection Association*, distinguished *Chaney*, upon which the ALJ relied, on the ground that "[r]efusals to institute rulemakings [under the Horse Protection Act], by contrast, are likely to be relatively infrequent and more likely to turn upon issues of law" (812 F.2d at 4). However, refusals to institute rulemaking under the Agricultural Marketing Agreement Act of 1937 are likely to be frequent and, generally, would not turn upon issues of law. There are about 84 federal marketing orders in effect under the Agricultural Marketing Agreement Act of 1937, as amended. Frequent requests for rulemaking hearings are likely to be made under most, if not all, of these orders. Only rarely would a request for a rulemaking hearing turn upon issues of law. (Handlers who believe that order provisions are not in accordance with law ordinarily institute adjudicatory proceedings under § 8c(15)(A) of the Act, rather than request a rulemaking hearing.) Hence the statutory provisions and the type of rulemaking involved in *American Horse Protection Association* distinguish that case from the present case.

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[3]The Horse Protection Act merely contains the customary grant of rulemaking authority (15 U.S.C. § 1828):

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

111. Assuming the Reviewability of the Secretary's Determination Not to Hold a Hearing, Such a Determination Is Reviewable in District Court Rather Than Here.

Assuming for the purposes of discussion that a reviewing court disagree with my views as to the nonreviewability of the Secretary's determination nc to hold a hearing as to whether shipments to Canada should be regarded a export shipments, exempt from volume regulation, the review of th Secretary's refusal to hold a hearing must be in a district court, rather tha in a § 8c(15)(A) proceeding.[4] The Administrative Procedure Act provides (U.S.C. §§ 701, 706; 5 U.S.C. § 702 (Supp. IV 1986)):

> § 701. Application; definitions
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that--
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.
>
> . . . .
>
> § 702. Right of review
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .
>
> . . . .
>
> § 706. Scope of review
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine

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[4]In *Nat'l Farmers Org., Inc. v. Lyng*, 695 F. Supp. 1207 (D.D.C. 1988), the court held (erroneously, I believe) that where the Secretary decided to hold a hearing under the Act involved here, a court has jurisdiction to review the Secretary's decision not to include certain proposals in the hearing. *NFO* is, nonetheless, distinguishable because there the Secretary had determined to hold a hearing, and the only issue was as to the scope of the hearing. Also, there was no convincing showing in *NFO*, as there is here, that the proposal lacked support from a cooperative with sufficient votes to block any amendment.

the meaning or applicability of the terms of an agency action. The reviewing court shall--

> (1) compel agency action unlawfully withheld or unreasonably delayed;. . . .

On the other hand, the Judicial Officer's jurisdiction in a proceeding under § 8c(15)(A) of the Act is limited to determining whether any "order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law" (7 U.S.C. § 608c(15)(A)). Assuming that the Secretary arbitrarily and capriciously denied petitioners' request to hold a hearing as to the Canadian export issue, such arbitrary and capricious action would not by itself make the orders or obligations imposed in connection therewith "not in accordance with law." (An amendment hearing, if held, might show that the factual circumstances have not sufficiently changed to warrant any change as to Canadian shipments.)

The Department's brief opposing petitioners' appeal correctly states the scope of a § 8c(15)(A) proceeding as follows (Respondent's Opposition to Petitioners' Appeal at 7-8):

> Section 8c(15)(A) of the AMAA, 7 U.S.C. § 608c(15)(A), provides a method by which the Secretary, acting in his judicial capacity, can review marketing orders already in effect. The provisions in section 8c(15)(A) were created so that handlers could voice specific objections that marketing order provisions allegedly are not in accordance with law. Issues that are cognizable in a proceeding under section 8c(15)(A) fall into two categories. The first category consists of issues which question the application of order provisions to a particular handler based upon some unique factual question involving that handler's operations. Examples of this type of issues are: the credibility of handler records and other conflicting evidence regarding specific transactions, *In re Roy Thompson, et al.*, 37 Agric. Dec. 1156 (1978); the determination of which of two parties is the handler under the Order because of a complicated contractual relationship between the parties, *In re Nick A. Barbaccia*, 37 Agric. Dec. 969 (1978); and the proper interpretation of a general order provision as applied to the unique circumstances at a handler's plant, *In re Vernon Cooperative Creamery Ass'n*, 38 Agric. Dec. 322 (1979).
>
> The second category of cognizable issues includes allegations that the marketing order is generally unlawful in some respect. The initial standard of review for this type of issues is to determine whether the complained of order provisions are authorized by the AMAA. Assuming there is statutory authority for an order provision, the next question, therefore, is whether there is a factual basis for the

challenged provision in the rulemaking record. Under section 8c(15)(A) the inquiry is a limited one that "[d]oes not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act." *In re County Line Cheese Co., Inc., et al.*, 44 Agric. Dec. 63, 81 (1985) [, *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987)].

Section 8c(15)(A) of the AMAA grants very specific rights to handlers to challenge order provisions in general or as applied to their operations. In no way does this section provide jurisdiction to review the Secretary's determination of whether or not a rulemaking hearing shall be held on a given proposal.

Petitioners contend that *Community Nutrition Institute v. Block*, 698 F.2d 1239 (1983), *rev'd on other grounds*, 467 U.S. 340 (1984), holds that a handler must first exhaust his § 8c(15)(A) remedies before attacking the Secretary's decision not to hold a rulemaking hearing (Petitioners' Appeal Brief at 9 n.6; Petitioners' Response to Respondent's Motion to Dismiss at 20-22). However, petitioners' reliance on *Community Nutrition Institute* is misplaced. That case merely holds that a handler who alleges in district court that there is no statutory authority for (compensatory payment) provisions included in a number of milk orders, after formal rulemaking hearings, must first challenge the legality of those order provisions in an 8c(15)(A) proceeding, before challenging them directly in court. The case does not stand for, or suggest, that a handler challenging the Secretary's refusal to conduct a rulemaking hearing must first present that issue in an 8c(15)(A) proceeding, before instituting a court action.

In *Community Nutrition Institute*, Joseph Oberweis, a milk handler, joined individual consumers and a consumer organization in petitioning the Secretary on August 23, 1979, to eliminate compensatory payment requirements from various milk orders on the grounds that such provisions are not authorized by the Act (698 F.2d at 1243). Before the Secretary ruled on their request, the handler and consumer groups filed an action in district court contending that the provisions were illegal, and, also, alleging that the Secretary's refusal to act on their petition was arbitrary and capricious (*id.*). However, after the district court action was filed, the Secretary ruled on their request, i.e., he denied the request, and, therefore, the court of appeals held that the attack on the Secretary's refusal to act was moot, and the handler's attack on the statutory authority of the provisions is barred by his failure to exhaust his administrative remedies. The court stated (698 F.2d at 1243, 1254-55):

On 23 August 1979 appellants petitioned the Secretary of Agriculture to eliminate the compensatory payment requirement from the various milk market orders. Nineteen months later, having failed

to receive a response to their petition, appellants filed the present action in federal district court, claiming that the regulation requiring compensatory payments exceeded the Secretary's authority under the AMAA and violated the provision of the AMAA prohibiting economic trade barriers on milk and milk products, and that his refusal to act on their petition was arbitrary and capricious. Appellants asked the court to invalidate, and enjoin the enforcement of, the compensatory payment provisions of the various milk market orders.

On 7 April 1981, four months after this suit was filed, the Secretary denied appellant's petition. This decision was made after "a careful and thorough review of the issues," based on public comments and "a comprehensive preliminary economic impact statement" developed by the agency. [Footnote omitted.]

. . . .

III. Exhaustion of Administrative Remedies

Appellant Joseph Oberweis is a handler of milk products. It is undisputed that he has standing to bring the present suit. [Footnote omitted.] Nevertheless, the district court dismissed Oberweis, holding that he failed to exhaust his administrative remedies. Oberweis admits that he has not meticulously followed the statutory procedures for filing a "handler petition" under section 608c(15)(A) [footnote omitted], but he argues that he should not be required to file another petition because he has substantially complied with the requirements of that section. We must reject that argument, however, because of the context in which the present action arose.

The present action is *not* an appeal from the Secretary's decision denying the petition filed by Oberweis and the other appellants in 1979. The complaint in this action was filed 2 December 1980, four months *before* the Secretary acted on the 1979 petition. In the complaint appellants asked the court, *inter alia*, to hold that the Secretary's *refusal to act* on the petition was arbitrary and capricious,[93] but they did not seek review of the decision itself. Appellants challenge the

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[93]Since the Secretary ultimately acted on the petition, appellants' complaint concerning his refusal to act is now moot.

Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; their complaint did *not* attack his subsequent refusal to

> correct that alleged wrong. Thus, Oberweis' argument that he substantially complied with section 15(A) by joining the other appellants in filing a petition in 1979 is misguided since he is not seeking a review of the Secretary's decision with respect to that petition. If Oberweis wants a court to decide whether his 1979 petition substantially complies with the exhaustion requirements of section 15(A) he will have to challenge the Secretary's decision on *that* petition. We express no opinion on the validity of Oberweis' argument in that respect because the present case does not involve that petition.
>
> Since Oberweis is not appealing from a ruling in which he first petitioned the Secretary for relief, we hold that he has not exhausted his administrative remedies as required by the statute. [Footnote omitted.]

Judge (now Justice) Scalia, concurring as to the handler issue but dissenting as to the consumers, similarly makes it clear that the handler, Oberweis, was not appealing the denial of his 1979 petition for rulemaking. Judge Scalia states (698 F.2d at 1258):

> Before us and the district court, Oberweis makes the same claim as the other appellants, that the milk marketing order was invalid. He does not seek to appeal denial of the 1979 petition for rulemaking, in which he joined the other appellants in alleging, among other things, invalidity of the order; but he asserts that the filing and denial of that petition satisfied the requirement that he exhaust his § 608c(15)(A) remedies--a requirement that does not apply to the other appellants.[5]

The Supreme Court similarly makes it clear that the court of appeals held that the complaint challenging the Secretary's inaction on the rulemaking request was moot, and, therefore, that the rulemaking-request issue was not before the Supreme Court. The Court states (*Block v. Community Nutrition Institute*, 467 U.S. 340, 344 n.2 (1983)):

> Prior to filing suit, respondents petitioned the Secretary to hold a rulemaking hearing to amend the market orders so that reconstituted milk would no longer be subject to the compensatory payment rule. See 44 Fed. Reg. 65989 (1979). The Secretary published a Notice of Request and asked for comments. *Ibid.* Subsequently, the Secretary published a preliminary impact analysis of the proposal and invited

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[5]Judge Scalia also makes it clear, in a well-reasoned opinion, that in order for a handler to exhaust his administrative remedies, he must institute an *adjudicatory* proceeding, under the Department's rules of practice (7 C.F.R. §§ 900.50-900.17), which is heard by an ALJ, with an appeal permitted to the Judicial Officer (698 F.2d at 1258-59).

comments. See 45 Fed. Reg. 75956 (1980). In April 1981, after respondents had filed suit in the District Court, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act. See App. 57-63. The portion of respondents' complaint challenging the Secretary's inaction on their rulemaking request was held moot by the Court of Appeals. 225 U.S. App. D.C. 387, 403, and n. 93, 698 F.2d 1239, 1255, and n. 93 (1983). Respondents did not cross-petition for certiorari review of this issue, and we therefore have no occasion to consider it.

Accordingly, in *Community Nutrition Institute*, neither the court of appeals nor the Supreme Court gave any opinion on, or even considered, the issues as to whether the Secretary's denial of a request to hold a rulemaking hearing is reviewable in a § 8c(15)(A) proceeding, or whether a handler must exhaust his administrative remedy *as to the denial of a request for a rulemaking hearing*, before instituting a court proceeding challenging such a denial. Furthermore, in *Community Nutrition Institute*, neither court considered whether the Secretary's denial of a request to hold a rulemaking hearing is reviewable at all in any proceeding.

IV. Assuming That the Secretary's Determination Not to Hold a Rulemaking Hearing Is Reviewable Here, the Allegations of the Petition Fail to State a Case of Arbitrary or Capricious Action.

Petitioners allege that the Secretary refused the request filed by petitioners and other growers and handlers to hold a hearing with respect to the Canadian export matter because there was not sufficient industry interest to begin the time-consuming and costly process of formal rulemaking (Petition at 4-5, ¶ 11, 6-7, ¶ 21). In fact, the Navel Orange Administrative Committee, which is the statutorily authorized industry committee, representing all segments of the navel orange industry, voted 8 to 1 against the holding of a hearing on this matter (Petition at 6, ¶ 18). Furthermore, the matter was not brought before either the Lemon Administrative Committee or the Valencia Orange Administrative Committee (Petition at 7, ¶ 22).

The three letters from the Assistant Secretary for Marketing and Inspection Services to petitioners' counsel, dated November 25, 1986, December 23, 1986, and March 6, 1987, denying petitioners' request for a rulemaking hearing, are as follows (Petition, Ex. 2, 4, 6):[6]

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[6]If a hearing were to be held, the matter would be decided on the basis of the written "record." Petitioners would not be permitted to call the Assistant Secretary as a witness, in order to probe his mental processes. *In re Sequoia Orange Co.*, 47 Agric. Dec. ___, slip op. at 261-66 (Jan. 29, 1988), *appeal docketed*, No. CV-F-88-98-EDP (E.D. Cal. Feb. 18, 1988).

Letter of Novemher 25, 1986

This is in response to your Octoher 20 letter requesting the suspension of specified provisions in the Federal marketing orders for navel oranges, Valencia oranges, and lemons grown in California and Arizona. You enclosed petitions from 27 growers or handlers requesting that the Department suspend order provisions which require that shipments of such fruit to Canada be treated as domestic shipments rather than as exports. Your letter asserts that such treatment of Canada is in conflict with a State of California export program.

We disagree with your assertion and note that in our view the decision by State officials to establish such an export program to increase market demand for California fruit is not inconsistent with the Federal marketing orders. Consequently, we do not believe the State of California program provides a basis for the suspension you have requested.

The Federal marketing order programs were promulgated to achieve a variety of objectives including the balancing of supplies for fruit with market requirements. Based on the record evidence addressed at the promulgation hearings, Canada was made a part of the domestic market under these marketing orders because of the similarities and interrelationships between the United States and Canadian markets and the need to maintain an effective compliance program. It should be pointed out that the marketing orders do not limit the expansion of sales to any particular market.

Letter of Decemher 23, 1986

This is in response to your December 8 letter requesting the Department of Agriculture to reconsider petitions filed by 27 growers and handlers to suspend certain provisions of the California-Arizona citrus marketing orders. In our November 25 letter, we denied that earlier request.

Your current letter provides additional arguments in support of your request. You also indicate that the basis for the Department's earlier denial of that request was erroneous. However, we feel that you raise a multitude of issues and facts whose various interpretations could only be properly dealt with in the setting of a formal rulemaking proceeding if sufficient industry interest in amending the orders was demonstrated.

In that regard, we fully support the active debate of industry concerns. New ideas and new approaches should be brought to the attention of various industry organizations in order to engage a large number of affected growers and handlers in the deliberative process. The most appropriate forums for your proposal are the respective California-Arizona citrus administrative committees, as these committees are nominated by and representative of all segments of the California-Arizona citrus industry.

Since it is extremely important for the industry to consider a wide range of views and reach a substantial consensus before the Department is asked to begin the time-consuming and costly process of formal rulemaking, we recommend that you and those you represent submit your proposal to the respective administrative committees for considerations.

Letter of March 6, 1987

This is in response to your February 5, 1987, letter, reiterating your November 25 request that the Department of Agriculture (USDA) hold a hearing on whether Canada should be designated as an export or domestic market under the navel orange marketing order.

We have not received any formal request from the Navel Orange Administrative Committee [that administers the Federal Marketing Order for navel oranges] (NOAC) to hold a hearing on the status of Canada under the order. Such a request is necessary for the Department to consider holding a hearing.

On January 27, 1987, the members of the NOAC voted 8 to 1 (with 2 abstentions) to rescind an earlier recommendation [which had passed by a vote of 6 to 4, with 1 abstention (Petition at 5, ¶ 12)] requesting USDA to hold a hearing on that issue. This is the latest information which USDA has on this matter, and it clearly indicates that a substantial consensus does not exist within the industry for holding such a hearing.

If you wish to pursue this matter, we suggest that you continue to work within the industry to garner support for your proposal.

In their petition, petitioners argue that the Secretary's refusal to hold a hearing because of a lack of industry support is arbitrary and capricious, stating (Petition at 8-9):

VI

25. The Secretary, is arbitrary and capricious and in violation of law and Section 900.3[7] of the regulations in that, by requiring a request from the marketing order committees before he will convene a hearing to amend the citrus orders, he has unlawfully relinquished or delegated to the industry marketing order committees the duty, imposed on him by the statute and his own regulations, of determining the statutory merits of hearing proposals and whether to convene a hearing on them.

26. The Secretary is arbitrary and capricious and in violation of the act and Section 900.3 of the regulations in denying a hearing on petitioners' proposals without investigating them to determine whether they tend to effectuate the act.

27. The Secretary is arbitrary and capricious and in violation of law and Section 900.3 of the regulations when, in denying a hearing on petitioners' proposals, he failed to notify petitioners how the present provisions of the citrus orders making Canada a domestic market, which are based upon marketing conditions existing more than thirty years ago, tend to effectuate the act and how the changed and different marketing conditions prevailing today do not.

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[7]The rules of practice as to rulemaking hearings provide (7 C.F.R. § 900.3):

§ 900.3 *Proposals.*

(a) A marketing agreement or a marketing order may be proposed by the Secretary or by any other person. If any person other than the Secretary proposes a marketing agreement or marketing order, he shall file with the Administrator a written application, together with at least four copies of the proposal, requesting the Secretary to hold a hearing upon the proposal. Upon receipt of such proposal, the Administrator shall cause such investigation to be made and such consideration thereof to be given as, in his opinion, are warranted. If the investigation and consideration lead the Administrator to conclude that the proposed marketing agreement or marketing order will not tend to effectuate the declared policy of the act, or that for other proper reasons a hearing should not be held on the proposal, he shall deny the application, and promptly notify the applicant of such denial, which notice shall be accompanied by a brief statement of the grounds for the denial.

(b) If the investigation and consideration lead the Administrator to conclude that the proposed marketing agreement or marketing order will tend to effectuate the declared policy of the act, or if the Secretary desires to propose a marketing agreement or marketing order, he shall sign and cause to be served a notice of hearing, as provided in this subpart.

28. The Secretary is arbitrary and capricious and in violation of law in relying on the evidence of marketing conditions in promulgation hearing records which are over thirty years old, instead of considering the changed and different marketing conditions currently prevailing which were presented with and in support of petitioners' proposals.

29. The Secretary is arbitrary and capricious and in violation of law in applying and operating under a rule or policy under which he requires a "consensus of the industry" favoring the proposals to amend the marketing orders before he will convene a hearing on them.

30. The Secretary is arbitrary and capricious in applying and operating under a rule or policy under which, in spite of the fact that he found that the proposals to amend the marketing orders have merit, he, nevertheless, requires a "consensus of the industry" before he will convene a hearing on them.

31. The Secretary is arbitrary and capricious in applying and operating under a rule or policy under which he requires a "consensus of the industry" before he will convene a hearing on proposals to amend the order, and under which he allows one organization, Sunkist, to veto or prevent a hearing from being held.

Petitioners argue (erroneously) in their brief that "the USDA concluded that the proposal would tend to effectuate the declared policy of the act since it found that the proposal raised 'a multitude of issues and facts whose various interpretations could only be properly dealt with in the setting of a formal rulemaking proceeding . . .' [footnote omitted]. On this basis, the Secretary, under Section 900.3(b) of the Rules of Practice, was required to initiate a rulemaking hearing" (Petitioners' Appeal Brief at 7). However, nothing in the Assistant Secretary's letters states, or suggests, that the Department concluded that the proposal would tend to effectuate the declared policy of the Act. The Assistant Secretary's letter of December 23, 1986, relied on by petitioners, merely states that the issues raised by petitioners could only be properly dealt with in the setting of a formal rulemaking proceeding, without stating, or suggesting, that the Department concluded that the proposal would tend to effectuate the declared policy of the Act.

Petitioners allege in their petition the opposition of Sunkist to petitioners' proposal, and the dominance of Sunkist on the administrative committees, as follows (Petition at 5-7):

12. Pursuant to the recommendation of the Secretary, the matter of whether Canada should continue to be part of the U.S. domestic market was brought before the Navel Orange Administrative Committee (NOAC) at its weekly meeting of January 13, 1987. After

considerable discussion on the matter, and in which the five Sunkist NOAC members expressed considerable opposition, the following motion was favorably acted upon:

. . . .

13. There are ten industry members and one "public" member on the NOAC. Five of the industry members represent Sunkist. In the voting on the motion, all non-Sunkist members and the public member voted for the motion. Four of the Sunkist members voted against the motion and one abstained.

. . . .

17. After the January 13 meeting, Sunkist, in order to preserve its competitive advantage over the other California - Arizona handlers in Canada, exercised its dominance over the NOAC and the industry at large. It waited until January 27 when it could control the particular industry members present, and then acted to counter the previous NOAC hearing action request.

18. On January 27, 1987, the NOAC met and on the motion of a Sunkist member, the NOAC "reconsidered" its January 13th motion to request the USDA to hold a hearing on the status of Canada. This time the vote was 8 to 1 to rescind the January 13 hearing request, with the one industry and the public member abstaining.

19. Of the industry members voting on January 27, five Sunkist and three non-Sunkist members voted to rescind the January 13 NOAC hearing request. Of the three non-Sunkist members, two had not attended the January 13 meeting and one, Beekman, who had voted for the hearing at the January 13 meeting, changed his vote and voted to rescind the request.

. . . .

22. In view of the expressed Sunkist opposition to a hearing to determine what the status of Canada should be under the conditions which exist today, and its ability to control certain of the non-Sunkist members of the NOAC, any attempt by petitioners to get another favorable vote of the NOAC would be futile. Further, even if such an attempt was made and was successful, Sunkist would again rescind the vote at a subsequent meeting when those members it could control are again present. The same dominance exercised by Sunkist over the

NOAC is also present in the Valencia and lemon administrative committees and any efforts in these committees would also be futile.

Petitioners then argue in their brief that the Secretary was erroneously speculating that a proposed amendment to make Canada part of the export market would be defeated in a referendum, because it is opposed by Sunkist. Petitioners argue (Petitioners' Appeal Brief at 8-9):

> Further, the USDA policy of requiring a request from the committee is not a "proper reason" for refusing to hold a hearing. This policy is based on the agency's desire to have a consensus of the committee before granting a hearing.[4] This desire is in turn based upon the fact that any amendment to the Order must pass by a two

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[4]The USDA presumes that the committee represents the views of the entire industry. The ten (orange) and twelve (lemons) industry members of the committees are nominated by majority vote of the different segments of the industry. As such, they function much like other elected officials and represent the mainstream or majority views of their constituency. There is certainly no assurance that a "consensus of the committee" will represent the minority views of the industry. The Secretary, however, is duty bound under the act to consider proposals on their merit regardless of whether they are in the views of the majority or the minority. He has failed in this duty when his determination is based on whether the proposal is supported by a consensus of the committee.

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thirds or three fourths vote of the producers, and that the Secretary does not want to expend time and resources on a proposal, no matter how meritorious, if he is of the view that it will not pass in a referendum. However, as noted in our "Response", the Secretary can only speculate as to the outcome of a referendum. The polls conducted during the campaign of our elected officials show just how much error there can be in such speculation. In any event, if the Secretary determines a rulemaking proposal will tend to effectuate the declared policy of the act and should go to hearing, as he did herein, the duty imposed upon him by the act requires him to grant a rulemaking hearing. He cannot avoid this duty by requiring a consensus of the committee. In the event that the proposed amendment is voted down in the referendum, the Secretary has the option to make the determination to terminate the order.[5] This is a relevant option since, in order to continue to effectuate the declared

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[5]As the Judicial Officer is well aware, in administering the milk ord it is the policy of USDA that it will terminate the milk order if amendment is voted down in the referendum.

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policy of the Act, the Orders must be updated by amendment to reflect changed conditions which inevitably occur over time. Accordingly, Secretary's denial of rulemaking herein was neither "reasoned" "proper". [Footnote omitted.]

We feel compelled to note that the Secretary may feel that he is not speculating as to the outcome of the referendum in that he has been made aware, through the vote of the committee or otherwise, that Sunkist opposes the hearing. Since Sunkist has about 50% of the production, and as a cooperative can block vote and prevent a three fourths majority vote in a referendum, the Secretary may feel that it would be a futile effort to go to a rulemaking hearing. If this is the case, then the Secretary's denial of rulemaking is clearly arbitrary and capricious since he has abandoned his duty under Sections 8c(3) and (4) of the act and is allowing Sunkist to dictate the provisions of the Order.

Petitioners misstate the Assistant Secretary's position. His letters indicating the desire for an industry consensus before going to a hearing, di not state, or suggest, that he is speculating that a proposal not favored b Sunkist will be vetoed by Sunkist in the required referendum hearing, but, rather, are consistent with the basic nature of the regulatory programs. The marketing order programs are not "Washington-dictated"--they are cooperative regulatory programs in which the Secretary and the industry jointly determine the marketing strategy that will best market the crop, primarily for the benefit of producers. The cooperative nature of the programs is well recognized by Congress and the courts. Furthermore, it is well recognized that the administrative committees, representing all segments of the lemon and orange industries, are supposed to play a major role in the decisionmaking and administrative process. In addition, it is well recognized that the marketing order programs are particularly designed to benefit cooperatives (such as Sunkist). These matters are set forth at length in *In re Sequoia Orange Co.*, 47 Agric. Dec. ___, slip op. at 33-34, 36-38, 142-43, 147-48, 226, 241-43, 266-71 (Jan. 29, 1988), *appeal docketed*, No. CV-F-88-98-EDP (E.D. Cal. Feb. 18, 1988), quoted immediately below. The end of the *Sequoia* quotation is marked by a heading "**END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.**"

EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

2. California-Arizona navel oranges have been subject to prorate restrictions since January of 1934, when a federal order was issued applicable to both navel and Valencia oranges. A revised order was issued in 1942, which continued in effect until it was terminated by growers in 1952, because of a disagreement over prorate equity between the navel and Valencia growers. Separate orders were approved in 1953 for navel oranges, and in 1954 for Valencia oranges. These orders have continued in effect, with amendments, until the present time. (Ex. 39, p. 71).

3. Marketing Order 907, regulating the handling of California-Arizona navel oranges, was promulgated in 1953 on the basis of evidence received at a public hearing. The Secretary's[17] findings, which are not challenged by petitioners, state in part (18 Fed. Reg. 4708, 4709-20 (1953)):

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[17]The term "Secretary," as used herein, refers to individuals to whom the Secretary delegated authority to act for the Secretary.

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(1) It is concluded that a marketing agreement and order program is needed to regulate the handling of navel oranges grown in the production area to establish and maintain such orderly marketing conditions thereof as will tend to establish parity prices for such oranges.

. . . .

The term "handle" should relate to transactions involving markets in the United States, Canada, and Alaska because such markets are considered by sellers of navel oranges grown in the production area to be, and are, one "domestic" market. Shipments to other--the export--markets are not proposed to be regulated under the marketing agreement and order because sales in those markets do not directly compete with, and are considered as diversions from, the "domestic" market. Moreover, Alaska should be included in the "domestic" market because it is supplied principally by shipments moving through northwest ports. Hence, its inclusion tends to assure compliance with the regulations of the program on the part of handlers shipping to northwest and Canadian markets.

. . . .

The term "export" should be defined to mean those shipments of fresh oranges to foreign markets which are not regulated under the

provisions of the marketing agreement and order. Shipments markets within the continental United States, Canada, and Alaska a regulated within the provisions of the proposed program.

. . . . A majority of the committee [Navel Orange Administrati Committee] should consist of producers because the program designed to benefit producers. The provision for handler membe tends to give balance to the committee and an opportunity fo presentation of handling and marketing viewpoints and problems fro the handlers' standpoint.

. . . .

Nomination for membership and representation on the committee should reflect the situation existing in the marketing of navel oranges grown in the production area. Marketing organizations predominate in the marketing of oranges grown in such area. There are 2 large cooperative marketing organizations in the production area, one of which [Sunkist Growers, Inc.] handles in excess of one-half of the total tonnage of oranges. There is one central marketing organization which is not classified as a cooperative, and most of the independent shippers are members of an independent association. The central marketing organizations, both cooperative and independent, market oranges produced throughout the production area. The interests of these organizations, therefore, are closely identified with producer interests in each of the important producing regions. Furthermore, such organizations must consider marketing problems affecting the producing area as a whole. It is appropriate, therefore, in view of the institutional structure of the marketing function in the production area, to provide for nominations and producer and handler representation obtained through such marketing organizations. This procedure would tend to result in representation from all districts within u small committee and reflects the industry organization on the committee.

The marketing agreement and order should, therefore, prescribe a nomination and selection plan for committee members and their alternates which would provide representation on the committee as follows: (1) Three grower and 2 handler members to represent any cooperative marketing organization which handles more than 50 percent of the total volume of oranges during the fiscal year during which nominations for members are submitted [Sunkist Growers, Inc.]; (2) one handler and 1 grower to represent all other cooperative marketing organizations; (3) two growers and 1 handler to represent all producers and handlers not affiliated with cooperative marketing organizations; and (4) the members so selected should meet and by a

concurring vote of at least 6 members should select nominees for a neutral member and alternate member of the committee.[8]

. . . .

In the legislative history of the Food Security Act of 1985, Congress restated its support for marketing order programs, and expressed great concern about any action by the Secretary to terminate marketing orders, stating (H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 193, 195-96, *reprinted in* 1985 U.S. Code Cong. & Admin. News 1103, 1297, 1299-1300):

THE AGRICULTURAL MARKETING AGREEMENT ACT

The Committee restates its support for marketing orders and agreements as set forth in the Agricultural Marketing Agreement Act of 1937 as amended. The Committee supports the authority conferred upon the Secretary to establish and maintain orderly marketing conditions for any agricultural commodity enumerated in section 8c(2). . . .

. . . .

TERMINATION OF MARKETING ORDERS

On July 1, 1985, Agriculture Marketing Service Administrator James C. Handley announced the termination of the Hops Marketing Order No. 991 to take effect on December 31, 1985. The reason stated for this decision was that "the order failed to implement and even has obstructed the purposes of the Agricultural Marketing Agreement Act of 1937, as amended." The Committee notes that this unprecedented action was taken within months after major reforms approved by the Secretary were initiated by the Hops Administrative Committee, although adequate time for implementation had not elapsed.

The Committee reaffirms its support for marketing orders that establish and maintain orderly marketing conditions as defined by the 1954 amendments to the Agricultural Marketing Agreement Act. It further recognizes that the termination of the hops marketing order was a unilateral decision by the Secretary, without the consent of, or notice, to affected industry representatives. Finally, the Committee is

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[8]For recent changes concerning the structure of the Navel and Valencia Orange Administrative Committees, which do not affect my conclusions in this case, see 53 Fed. Reg. 21,651 (1958). For recent proposed rulemaking to make Canada part of the export market for Florida Order No. 905 (not involved in this proceeding), see 54 Fed. Reg. 6136 (1989).

aware that season average prices for hops meet the declared policy of the Act and recommends the continuation of the order.

The Committee is not only concerned about potential market instability and chaos in the hops industry that would result from the unanticipated termination of the order. It has serious reservations about the potential for this type of broad exercise of authority by the Secretary to abruptly terminate any marketing order. The Committee believes that marketing order programs provide a tested mechanism of self-regulation for industry groups marketing agricultural commodities. All regulations approved by the Secretary are negotiated through a process of participation and cooperation with industry representatives. For almost 50 years, the orderly marketing of fruits, vegetables, nuts, and milk has been achieved through this process, and the American consumer has benefitted by receiving sufficient quantities of quality food items at reasonable prices. Termination of an order without the approval of, or consultation with, the affected industry strikes the Committee as a drastic measure. In the lengthy history of marketing orders, this is the first such termination by the Secretary.

Following the July 1, 1985 announcement of termination of the hops marketing order, the Committee approved an amendment to limit the authority of the Secretary of Agriculture to terminate marketing orders. This amendment requires the Secretary to obtain the support of a majority of producers in any industry before he may institute an action to terminate an order in effect on or after July 10, 1985. It is the intent of the amendment to nullify any terminations announced, but not yet in effect on July 10, 1985, or any terminations announced between that date and the date of enactment.

The amendment approved by the Committee does not limit the authority of the Secretary to suspend a marketing order in any given season with adequate justification, nor does it deny the Secretary authority to reject a regulation at any time during a marketing season. Rather, the amendment requires the Secretary to obtain approval by a majority of affected industry representatives prior to terminating any marketing order.

. . . .

. . . The essential purpose of the Act is to raise producer prices (see note 31). The Senate Report as to the Act states (S. Rep. No. 1011, 74th Cong., 1st Sess. 1, 3 (1935)):

The primary objective set forth in the declaration of policy in the Agricultural Adjustment Act is to secure fair exchange value for farm products. This objective is, in itself, a worthy one from the standpoint of economics and social justice to farmers, and is of real national importance in the recovery program. By restoring and sustaining farm buying power, the Agricultural Adjustment Act can contribute effectively to the general recovery of business.

. . . .

. . . The operations of cooperative marketing associations will be reenforced by these sections, which will assure the cooperation of processors and distributors in programs intended to raise farm prices. The marketing agreements and licenses which have been issued and entered into pursuant to the Agricultural Adjustment Act have contained a great variety of provisions in order to adapt each particular program to the peculiar problems and circumstances presented in a given area by a particular commodity. The essential purpose of these agreements and orders has, however, always been to raise producer prices.

The Ninth Circuit correctly distinguished between "pious platitudes about the interests of consumers" and the real purpose of the Act, stating (*Rasmussen v. Hardin*, 461 F.2d 595, 599 (9th Cir.), *cert. denied*, 409 U.S. 933 (1972) (emphasis added)):

Nor can it be said that Congress overlooked consumers, and that therefore it did not intend to exclude them from obtaining administrative and judicial review of the Secretary's orders. *The Act contains some pious platitudes about the interests of consumers.* See §§ 602(2)(3)(4), 608a(1). *The primary purpose of the Act, however, is to protect the purchasing power of the farmers and the value of agricultural assets.* (§ 601.) The whole scheme of the Act is to raise the prices of agricultural products to, and keep them at, levels fixed by the Secretary, and to establish "orderly" marketing of them. Bluntly stated, that means, in part, marketing freed to a very large extent from price competition. It is arguable that the immediate, and possibly the long-run, interests of consumers are contrary to these goals. It is not surprising that the Act is full of provisions for agreements between the Secretary and producers (§ 608(2), 608a(3)) or growers (§ 608a(3)), processors (§ 608b) and handlers (§ 608b), agreements which are exempt from the antitrust laws (§ 608b); for votes by producers (§ 608c(8)(A), (9)(B), (12), (16)(B), (19)), and processors, (§ 608c(19)); for the regulation of processors, associations of producers, and other handlers (§ 608c(1)); and for loans, quotas, etc. There are provisions for hearings (§§ 608(5), 608c(3)). But it is very clear that the whole

> structure of the Act contemplates a cooperative venture between the Secretary, the producers, and handlers. Nowhere in the Act can we find an express provision for participation by consumers in any proceeding. We are convinced that this is no accident.
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> . . . .
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> Petitioners argue that Sunkist has enough votes to defeat any amendment that would eliminate District 2's inherent export advantage. Assuming that to be true, there is no law that guarantees to a dissident, vocal minority that their views will prevail.
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> . . . .
>
> Although there is no evidence that the Director ever changed NOAC's recommendation as to the specific number of cars that should be permitted to be shipped by a particular district, the record includes at least seven examples over a period of 4 years (five of which relate to the 1985 situation) where NOAC recommended volume limitations for a particular week, but the Division Director refused to promulgate volume limitations (Finding 20). This demonstrates that the Department independently evaluated NOAC's recommendations, and exercised the authority, when it felt necessary, to differ with NOAC's recommendations. This is consistent with the Act, which "contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984).
>
> The same cooperative venture is referred to in *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974), as follows:
>
> > Congress has approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recommendations to the Secretary. *See, e.g.*, Sen. Rep. No. 566, 87th Cong., 1st Sess., p. 39, 2 U.S.C.C.A.N., 87th Cong., 1st Sess., pp. 2243, 2281.
>
> In this respect, it should be noted that Congress does not intend for the Secretary to substitute his judgment for that of the industry as to how best to market a crop in ordinary circumstances. As stated in H.R. Rep. No. 271, 99th Cong., 1st Sess. 193, *reprinted in* 1985 U.S. Code Cong. & Admin. News 1103, 1297 (emphasis added):

THE AGRICULTURAL MARKETING AGREEMENT ACT

> The Committee restates its support for marketing orders and agreements as set forth in the Agricultural Marketing Agreement Act of 1937 as amended. The Committee supports the authority conferred upon the Secretary to establish and maintain orderly marketing conditions for any agricultural commodity enumerated in section 8c(2). . . .
>
> Historically, Marketing Order Administrative Committees, comprised of producer, handler, and consumer representatives appointed by the Secretary, have been instrumental in recommending regulations necessary to maintain orderly market conditions. In large measure, the Administrative Committees help to ensure that commodity supplies achieve specified quality standards in a regular flow established through marketing quotas. The Committee encourages the cooperation of the Secretary with designated Administrative Committees. *To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the Agricultural Marketing Agreement Act of 1937, and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how best to market a crop.*

NOAC's weekly volume limitation recommendations represent a consensus of the industry (Finding 17). A "consensus" is, of course, "the judgment arrived at by most of those concerned" (*Webster's Third New International Dictionary, Unabridged* 482 (1981). NOAC is representative of the entire industry (Findings 3, 17). Over half of the final votes as to NOAC's weekly volume recommendations were unanimous. Most of the others were nearly unanimous. (Finding 17).[68]

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[68]Petitioners are a small group of District 1 dissidents who do not speak for other handlers in District 1. An *amicus curiae* brief filed on behalf of Sunkist and 10 independent District 1 handlers, in opposition to petitioners, asserts that sunkist and the 10 independents handle more than 80% of the oranges in District 1 (Initial Amicus Curiae Brief In Support of Appeal of Respondent at 1-2 (July 7, 1987)). Petitioners correctly argue that the record does not show that Sunkist and the 10 independents handle over 80% of the volume in District 1, but the record does show, nonetheless, that petitioners handle only a small percentage of the District 1 navel orange crop. Furthermore, in the latest producer referendum, 91% of the voting producers favored continuation of the navel orange marketing order program (Finding 4).

Much of petitioners' argument is devoted to an attack on perce benefits of the order to Sunkist Growers, Inc., the leading cooperative in field. Petitioners' argument overlooks the fact that the Act is particul designed to benefit cooperative associations. As stated in the Senate Rep as to the Act (S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935)):

> The operations of cooperative marketing associations will be reenforced by these sections, which will assure the cooperation of processors and distributors in programs intended to raise farm prices.

In addition, as stated in *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 2 286-89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished *cert. denied*, 444 U.S. 1077 (1980):

> Moreover, the Supreme Court has expressly approved block voting by dairy cooperatives under the Act even if the effect of the Order gives the cooperatives a monopoly of the market. Specifically, the Court held in *United States v. Rock Royal Co-op.*, 307 U.S. 533, 559-560:[7]

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[7]See, also, *H. P. Hood & Sons v. United States*, 307 U.S. 588, 599.

> It is quite true that the League [*i.e.*, a cooperative] which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act [7 U.S.C. 608c(12)], authorizing cooperatives to express the approval or disapproval for all of their members or patrons. This is not an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. *If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not*

violate the Sherman Act or justify the refusal of the injunction. [Footnotes omitted; emphasis supplied.]

The programs for the regulation of milk marketing under the Act are largely an extension and continuation of the work of cooperative marketing associations prior to this legislation.[8] It was recognized

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[8]See, *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 192-196; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 188-210; *Agricultural Cooperation in the United States* (Farm Credit Administration, April 1947), p. 45 *et seq.*

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early in the administration of the Act that without a strong cooperative in a milk market "the cornerstone for a successful program is lacking." *Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation* (1939), p. 31. "It would be impossible to have the type of regulatory program which exists today without strong co-operative organizations." *Id.* at p. 30. See, also, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 467-478; Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267-268.

The distinction under the Act between cooperatives and other handlers, and the encouragement to be given cooperatives under Federal Milk Orders, was recognized in *United States v. Rock Royal Co-op., supra*, 307 U.S. 533, 562-564, as follows:

> Different treatment has been accorded marketing cooperatives by state and federal legislation alike. Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress,[9] and as will tend to promote efficient methods of

[9]Numerous acts of Congress deal with cooperatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing cooperatives. Some of the instances of the Congressional policy of special consideration for, and treatment of, cooperatives are in the Agricultural Marketing Act of June 15, 1929 (12 U.S.C. 1141, 1141j), the Clayton Act (15 U.S.C. 17); the Capper-Volstead Act (7 U.S.C. 291); the Robinson-Patman Act of June 19, 1936 (15 U.S.C. 13b); the Commodity Exchange Act (7 U.S.C. 10a); and the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). See, also, Nourse, *The Legal Status of Agricultural Cooperation*, pp. 241-266; and Hulbert, *Legal Phases of Co-operative Associations* (Farm Credit Administration, May 1942), pp. 307-322.

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marketing and distribution." [7 U.S.C. 610(b)(1)]. These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.

* * *

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons. [Footnotes omitted.]

Similarly, the favored position of producers under the Act (which includes, of course, cooperatives) was expressed in *In re Michaels Dairies, Inc.*, 33 Agr Dec 1663, 1709 (1974), affirmed *sub nom. Michaels Dairies v. Butz*, [No. 22-75] 34 Agr Dec 1319, 1320, 1323 (D.C. D.C. [Aug. 21, 1975]), affirmed, [546] F.2d [1043] (No. 75-2023, C.A. D.C., decided December 17, 1976), as follows:

Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other, the statute provides a clear-cut basis for resolving the clash. Orders issued under the Act are "principally for the economic protection of producer and consumer" (*United States v. Mills*,

315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.

Although the foregoing discussion involves dairy cooperatives, the same reasoning is, of course, applicable to cooperatives handling navel oranges.

Much of petitioners' argument laments the fact that if their views do not prevail here, there is no other forum in which their views can prevail. But, as stated in § VI, *supra*, I know of no reason why the views of a small minority should prevail over the overwhelming contrary views of producers and other handlers similarly situated to petitioners. (Since District 1 produces more than 85% of the navel oranges regulated under the order (Ex. 10, p. 15), District 1 producers alone have far more than the necessary two-thirds vote to amend the order.)

Much of petitioners' argument also refers to District 2 as "Sunkist's district" (e.g., Cross-Appeal Memorandum of Riverbend Farms, *et al.* at 3). Petitioners' attempt to give the impression that Sunkist, which nominates 5 of NOAC's 11 members, has a motive for favoring District 2 over District 1. The truth of the matter is that from 90% to 98% of Sunkist's navel oranges are grown in District 1 (Ex. 798)1 Furthermore, as shown above, there is no support for petitioners' view that District 2 has been favored over District 1, or that NOAC members nominated by Sunkist favor any objectives peculiar to Sunkist.

In particular, petitioners contend that Sunkist wants merchantable oranges diverted to processing so that Sunkist's processing plants are kept fully supplied, and that NOAC members nominated by Sunkist voted to limit fresh domestic shipments in order to keep Sunkist's processing plants well supplied.

There are a number of problems with petitioners' contention. First, and of greatest importance, is the fact that it was improper to subpoena or receive evidence as to the motives of NOAC's members nominated by Sunkist, in the absence of a prior strong showing of bad faith or improper conduct.

Second, the evidence does not support a finding that NOAC members voted to support Sunkist's objectives, rather than to support the best interests of the producers and handlers whom they represented. (The NOAC members nominated by Sunkist were, themselves, producers and handlers, including producers and handlers from District 1.) During the years in which NOAC hired Dr. Fox, a well-recognized expert, to assist in determining the optimum level of oranges that could be shipped in fresh domestic channels in order to maximize total producer revenue, NOAC voted unanimously, on every

occasion, to permit *more* oranges to be marketed in fresh domestic channels than Dr. Fox had recommended. This destroys petitioners' argument that the Sunkist-nominated members of NOAC were seeking to divert oranges to processing in order to keep Sunkist's processing plants well supplied.

Third, this is the type of issue that is more appropriate for a rulemaking hearing than a § 8c(15)(A) hearing. That is, Sunkist's dominant role on the committee (NOAC) is set forth in the order, based on an unchallenged rulemaking record, and is entirely consistent with the congressional purpose of this regulatory program (see the quotations set forth earlier in this section).

END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

In view of the cooperative nature of the marketing order programs, the Secretary's decision not to institute a rulemaking proceeding, that was opposed 8 to 1 by the Navel Orange Administrative Committee, and was not even presented to the Valencia Orange Administrative Committee or the Lemon Administrative Committee, and for which there was no substantial consensus within the industry, was perhaps the only reasonable and proper course of action that could have been taken. Certainly, the Secretary's decision not to hold a rulemaking hearing was not arbitrary or capricious. Accordingly, the allegations of the petition fail to state a case of arbitrary or capricious action by the Secretary.

In this respect, it is appropriate to include one final quotation from *In re Sequoia Orange Co.*, 47 Agric. Dec. ____, slip op. 102-08 (Jan. 29, 1988), *appeal docketed*, No. CV-F-88-98-EDP (E.D. Cal. Feb. 18, 1988), which sets forth petitioners' burden of proof and the narrow scope of review under the arbitrary and capricious standard. The end of the *Sequoia* quotation is marked by a heading "**END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.**"

EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

The fact that petitioners have the burden of proof in this proceeding, and that this is not a proceeding to "second guess" the Secretary's policy judgments, is set forth in many decisions, e.g., *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976), which states:

> It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)). See *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *United States*

832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862- 863 (C.A. 3); *In re Clyde Lisonbee*, 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.*, 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield*, 236 F.2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; *Reed v. Franke*, 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.*, 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15. Accord: [*Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953);] *Reines v. Woods*, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate*, 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings*, 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568 (a case under the Act involved herein);

Thompson v. Consolidated Gas Co., 300 U.S. 55, 69; *Pacific States Co. v. White*, 296 U.S. 176, 185-186.

The scope of review is set forth in § 10(e) of the Administrative Procedure Act as follows (5 U.S.C. § 706):

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

The "narrow" scope of review under the arbitrary and capricious standard (just quoted (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:

Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts

> is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under § 706(2)(A), i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir. 1975) (en banc) (footnotes omitted), *cert. denied*, 426 U.S. 941 (1976), as follows:

> This standard of review is a highly deferential one. It presumes agency action to be valid. . . . Moreover, it forbids the court's substituting its judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision. [73] . . .
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors * * *." [74] Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.
>
> > A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.
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> *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971). . . .

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a super agency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. . . . The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. . . . It is settled that we must affirm decisions with which we disagree so long as this test is met. [76]. . . .

Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality. [77] "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitrary or capricious. [78]

the "arbitrary and capricious" standard,
e its judgment for that of the agency,"
verse an agency, is set forth in *Motor*
nc. v. State Farm Mut. Auto. Ins. Co.,

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington*

Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, *supra*, at 285; *Citizens to Preserve Overton Park v. Volpe*, *supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *In re Schepps Dairy, Inc.*, 35 Agric. Dec. 1477 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

> Section 8e(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra* [401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969)], at page 319.
>
> . . . .
>
> While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.
>
> . . . .
>
> In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the

Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra*, pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra*, pages 317, 319.

This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co.*, 26 A.D. 201, 217 [, *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972)].[25] It is not sufficient for

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[25]*Sunny Hill* cites (26 Agric. Dec. at 217):

See, *e.g.*, *United States v. Howeth M. Mills et al.*, *supra* [315 F.2d 828, 838 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)]; *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 A.D. 1209, 1220 (1957), *aff'd*, S.D. Miss., Jan. 5, 1959; In re Clover Leaf Dairy Co., 15 A.D. 339 (1956), *aff'd*, N.D. Ind., Sept. 10, 1958. Cf. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 182 (1935).

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petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

END OF EXCERPTS FROM IN RE SEQUOIA ORANGE CO.

For the foregoing reasons, the following order should be issued.

Order

The petition filed in this proceeding is hereby dismissed.

In re: GERAWAN CO., INC.
89 AMA Docket No. F&V 917-6.
Order Denying Interim Relief filed June 2, 1989.

Helen G. Boutrous, for Respondent
Thomas E. Campagne and Clifford C Kemper, for Petitioner.
Order issued by Donald A Campbell, Judicial Officer

Petitioner Gerawan Co., Inc.'s, Application for Interim Relief is denied. *In re Cal-Almond, Inc.*, 48 Agric. Dec. ____ (Mar. 8, 1989); *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. ____ (July 8, 1988), *reconsideration denied*, 47 Agric. Dec. ____ (Aug. 3, 1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchard & Almond Processing*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048, 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

In re: DR. CHARLES D. CLINKENBEARD.
A.Q. Docket No. 88-22.
Decision and Order filed December 2, 1988.

Interstate movement of cattle - Requirement of document stating identifying numbers of backtags.

Sheila Novak, for Complainant.
Richard Harris, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This proceeding was instituted by a complaint alleging respondent caused 52 cattle to be moved interstate on June 12, 1985, which "were not accompanied by a document stating the identifying numbers of the backtags or other approved identification applied to the cattle, as required (by regulation 71.18)."

Respondent answered that the cattle were identified by the same eartag numbers recorded on the brucellosis test chart which accompanied the health papers, and that he had mailed a copy to the Oklahoma State Department of Agriculture.

Complainant has moved for the adoption of a Decision and Order assessing respondent a $500 civil penalty. Complainant contends that by his answer, respondent has admitted all material allegations of the complaint. Complainant argues that "a brucellosis test chart" is not one of the documents listed in regulation 71.18 as the kind that must accompany cattle shipped interstate.

Regulation 71.18 (9 C.F.R. Section 71.18) provides that cattle moved interstate must be accompanied by an owner's statement or "other document" which shows the identifying numbers of their backtags or eartags. The term "other document" is explained (71.18(a)(1)(iii)(d)) to include a shipping permit, an official health certificate, a bill of lading, a waybill, or an invoice."

Complainant has explained that a final rule has been promulgated which would permit persons preparing health certificates to staple a brucellosis test record, listing eartags, to the certificate in satisfaction of the regulation. However, since the new rule was not in effect on June 12, 1985, complainant requests imposition of the $500 civil penalty as requested in the complaint.

Respondent has submitted his own proposed decision in which the violation would be found sanctioned by a warning.

Under these circumstances, I believe a warning is sufficient. At most, respondent did not precisely comply with the letter of a regulation. A technical violation of a regulation of this kind does not warrant imposition of a $500 civil penalty under the Act of February 2, 1903, as amended (21 U.S.C.

Sections 111 and 120). Accordingly, the following findings, conclusions and order issuing a warning shall be entered.

Findings of Fact

1. Dr. Charles Clinkenbeard, respondent, is an individual whose address is 2610 S.E. Washington Blvd., Bartlesville, Oklahoma 74003.

2. On or about June 12, 1985, respondent caused approximately fifty-two (52) cattle, two years of age or over, to be moved interstate from Bartlesville, Oklahoma to Cedar Lane, Texas, in violation of section 71.18 of the regulations (9 C.F.R. Section 71.18) because the cattle were accompanied by a Brucellosis chart stating the identifying numbers of the backtags or other approved identification applied to the cattle, rather than noted on the chart itself.

Conclusion

Respondent's actions, as stated in Finding of Fact 2, *supra*, constituted a technical violation of section 71.18 of the regulations (9 C.F.R. Section 71.18). However, these actions comply with the present applicable rule.

Therefore, the following order is issued.

Order

The respondent, Dr. Charles D. Clinkenbeard, is issued a warning.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. section 1.145).

[This Decision and Order became final February 24, 1989.-Editor]

In re: JOHN CASEY.
A.Q. Docket No. 275.
Decision and Order filed January 31, 1989.

Interstate movement of cattle - Importance of Brucellosis Education Program explained.

The Judicial Officer affirmed Judge McGrail's order assessing civil penalties of $9,000 becaus respondent moved cattle interstate on three occasions without having the required owner' statement (or other document) and health certificate, and because the cattle were not subjecte to an official test for brucellosis within 30 days prior to the interstate movement. The facts d not support respondent's contention that the cattle were moved in the course of normal ranchin operations without change of ownership to premises belonging to the same owner. Findings Fact by ALJ's are given great weight by the Judicial Officer. The importance of the Brucello Eradication Program is explained.

Lori Ben McClave-Monfort, for Complainant.
Thomas L. Belaustegui, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122), for violations of the Act and the regulations promulgated thereunder (9 C.F.R. § 71.1 *et seq.*) (1985), governing the interstate movement of cattle. An initial Decision and Order was filed August 4, 1988, by Administrative Law Judge Edward H. McGrail (ALJ) assessing civil penalties of $9,000.

On September 9, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).* The case was referred to the Judicial Officer for decision on November 28, 1987.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few minor editorial changes. The effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION
Preliminary Statement

This is an administrative proceeding to consider alleged violations of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), and the regulations promulgated thereunder (9 C.F.R. § 71.1 *et seq.*).

Complaint in this matter was issued on June 12, 1986, by the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, alleging that on three separate occasions in January 1985, respondent moved specific numbers of cattle in interstate commerce from Oregon to California in violation of 9 C.F.R. §§ 71.18 and 78.9(b)(3)(ii).

Respondent filed answer on November 10, 1986, denying the substantive allegations of the complaint.

Oral hearing, in accordance with the Rules of Practice (7 C.F.R. § 1.130 *et seq.* and 9 C.F.R. § 70.1 *et seq.*), was held before the undersigned on July 13-14, 1988, at Reno, Nevada. Complainant was represented by Lori Ben McClave-Monfort, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Respondent was represented by Thomas L. Belaustegui, Esq., Reno, Nevada.

As a preliminary matter, at the commencement of the oral hearing, complainant's counsel stated that, in accordance with the Amended Rules of Practice, 7 C.F.R. § 1.142(c),[1] she intended to enter a motion for an oral decision ("bench decision") at the completion of the oral hearing. In view of this, the parties were advised that an oral statement, summarizing the evidence of record, would be required at the conclusion of the testimony.

Following the conclusion of testimony, complainant's counsel made such motion, and the parties presented their summary statements. A recess was taken by the undersigned to consider the evidence and determine whether or not a bench decision should be issued. From detailed notes taken during the course of testimony, a review of exhibits received into the record, and consideration of the oral summary statement given by the parties, the undersigned did issue a bench decision finding that the complainant had proven, by substantial evidence of record, each of the allegations cited in the complaint. A civil assessment of $1,000 for each of the nine cited violations in the complaint was imposed. The bench decision has been extracted from the transcript (Tr. pp. 195-197),[2] and is attached hereto as an appendix.

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[1]Published in the Federal Register, Vol. 53, No. 44, Monday, March 7, 1988.

[2]References to the hearing transcript are designated "Tr.". References to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively.

Statement of Law and Regulations

Sections 111 and 120 of Title 21 of the United States Code authorize the Secretary to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle. Section 122 of Title 21 of the United States Code provides for the assessment of not more than $1,000 for each violation of the regulations issued by the Secretary pursuant to the authority invested in him in sections 111 and 120 of Title 21, United States Code.

Section 71.18 of the regulations, 9 C.F.R. § 71.18, promulgated by the Secretary pursuant to the above authority requires, as pertinent here, that cattle 2 years of age, or over, and moved interstate other than directly to slaughter or to a quarantined feedlot must be accompanied by an owner's statement, or other document, showing the point of origin, the destination, the number of animals covered by the statement, the name and address of the owner or shipper, and the identifying numbers of the backtags or other approved identification.

Section 78.9, 9 C.F.R. § 78.9, requires that cattle be subjected to an official blood test within 30 days prior to movement and be accompanied by a certificate showing the dates and results of the tests.

Issues

The issues presented here are not complex. The matters to be determined are whether respondent moved, in interstate commerce, from Oregon to California, 52 head of cattle on January 18, 1985; 364 head of cattle on January 19, 1985, and 156 cattle on January 20, 1985, 1) without being accompanied by an owner's statement, or other document, as required; 2) without the cattle being subjected to official brucellosis tests within 30 days prior to such interstate movement, as required; and 3) without being accompanied by a certificate, as required.

Findings of Fact

Based on my bench decision made at the oral hearing, the following detailed findings are made:

1. John Casey, respondent, is an individual whose address is 3906 South Virginia Street, Reno, Nevada 89502.

2. On or about January 18, 1985, respondent moved approximately 52 cattle from Plush, Oregon, to Laytonville, California. (CX 2, 3, 10-13, 24, 31, 32)

3. The cattle referred to in paragraph 2 were over two years of age when moved interstate. (CX 12-13; Tr. p. 151, lines 5-7)

4. The cattle referred to in paragraph 2 were not accompanied by an owner's statement or other document when moved interstate. (CX 2, 3)

5. The cattle referred to in paragraph 2 were not accompanied interstate by a health certificate. (CX 12, 24, 36, 37; Tr. p. 131, lines 7-12; Tr. p. 135, lines 9-11)

6. The cattle referred to in paragraph 2 were not subjected to an official test for brucellosis within 30 days prior to the interstate movement. (CX 12, 24, 36, 37; Tr. p. 134, lines 11-18)

7. The cattle referred to in paragraph 2 were moved interstate with a change of ownership from premises that respondent did not own, lease, or rent to premises that respondent did not own, lease, or rent. (CX 2, 3, 12 and 13)

8. On or about January 19, 1985, respondent moved approximately 364 cattle from Plush, Oregon, to Laytonville, California. (CX 4, 5, 6, 10-13, 15-20, 23, 25-28, 30, 31, 32, and 35; Tr. p. 114, lines 18-22; Tr. p. 115, lines 1 and 2; Tr. p. 116, lines 4-6, 16-24)

9. The cattle referred to in paragraph 8 were over two years of age when moved interstate. (CX 12 and 13; Tr. p. 151, lines 5-7)

10. The cattle referred to in paragraph 8 were not accompanied by an owner's statement or other document when moved interstate. (CX 4, 5, 6, 13; Tr. p. 119, line 25; Tr. p. 120, lines 1 and 2)

11. The cattle referred to in paragraph 8 were not accompanied interstate by a health certificate. (CX 12, 25, 26, 36, 37; Tr. p. 131, lines 7-12; Tr. p. 135, lines 9-11)

12. The cattle referred to in paragraph 8 were not subjected to an official test for brucellosis within 30 days prior to the interstate movement. (CX 12, 25, 26, 36, 37; Tr. p. 134, lines 11-18)

13. The cattle referred to in paragraph 8 were moved interstate with a change of ownership from premises that respondent did not own, lease, or rent to premises that respondent did not own, lease, or rent. (CX 4, 5, 6, 12, 13, and 35)

14. On or about January 20, 1985, respondent moved approximately 156 cattle from Plush, Oregon, to Laytonville, California. (CX 7-14, 21, 22, 23, 26, 29-35, 39; Tr p. 114, lines 18-22; Tr. p. 115, lines 1 and 2; Tr. p. 118, lines 15-18)

15. The cattle referred to in paragraph 14 were over two years of age when moved interstate. (CX 12, 13; Tr. p. 151, lines 5-7)

16. The cattle referred to in paragraph 14 were not accompanied by an owner's statement or other document when moved interstate. (CX 7, 8, 9, 13; Tr. p. 119, line 25; Tr. p. 120, lines 1 and 2)

17. The cattle referred to in paragraph 14 were not accompanied interstate by a health certificate. (CX 12, 26, 36, 37; Tr. p. 131, lines 7-12; Tr. p. 135, lines 9-11)

18. The cattle referred to in paragraph 14 were not subjected to an official test for brucellosis within 30 days prior to the interstate movement. (CX 12, 26, 36, 37; Tr. p. 134, lines 11-18)

19. The cattle referred to in paragraph 14 were moved interstate with a change of ownership from premises that respondent did not own, lease, or rent to premises that respondent did not own, lease or rent. (CX 7, 8, 9, 12, 13, 35)

Conclusion

By reason of the facts set forth in the Findings of Fact, respondent has violated the Act and sections 71.18 and 78.9(b)(3)(ii) of the regulations issued under the Act (9 C.F.R. § 71.18 and § 78.9(b)(3)(ii)).

Civil Assessment

Section 122 of Title 21 of the United States Code provides for the assessment of a civil penalty ". . . of not more than one thousand dollars" for each violation of the regulations published pursuant to authority granted to the Secretary in §§ 111 and 120 of Title 21 of the United States Code. Each of the violations cited in the complaint, and proven by complainant, is a separate and distinct violation subject to the maximum penalty of $1,000.

Severe sanctions for violation of the Department's regulations has been an established policy. *In re Braxton Warsley*, 33 Agric. Dec. 1547, 1556-71 (1974); See also *In re Donald Hageman, S&H Hogs, Inc., et al.*, 42 Agric. Dec. 531, 546 (1983), and cases cited therein. Complainant here seeks the maximum civil penalty assessment for each proven violation. The evidence of record is void of any mitigating or extenuating circumstance which could lessen the assessment of the maximum civil penalty. Rather, the record shows the respondent to be an experienced cattleman and one who was aware of the regulations.

Therefore, the evidence of record supports the requested assessment of $1,000 for each violation alleged and proven as appropriate to accomplish the goals of compliance and deterrence of respondent and others similarly situated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends that he comes within the exception applicable to the interstate movement of cattle in 9 C.F.R. § 78.9(b)(3)(iv) (1985), which states:

> (3) *Movement other than in accordance with paragraphs (b)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

. . . .

(iv) Such cattle, if they are moved interstate in the course of normal ranching operations without change of ownership and to another premises belonging to the same owner, may be moved without testing and without a certificate.

The ALJ found, however, on the basis of his evaluation of respondent's testimony, that the facts do not support respondent's contention. In the first place, respondent's interstate movement of cattle involved a change of ownership. Phil Lynch, the seller of the cattle, stated under oath that respondent purchased several loads of cattle from the Lynch Brothers in January 1985, to be shipped to an Oregon destination (CX 12). The State of Oregon requires a brand inspection, as evidenced by a brand inspection certificate, when cattle change ownership (Tr. 20, 26). Oregon brand inspection certificates reflecting the sale of cattle by the Lynch Brothers to respondent were issued on January 17, 19, and 20, 1985, for the movements which occurred on January 18, 19, and 20, 1985, respectively (CX 2, 4, 7, 13). Hence the record supports the ALJ's finding that the cattle were moved interstate by respondent following a change of ownership.

In addition, the ALJ did not believe respondent's vague testimony that he had a lease for the specific land owned by the Lynch Brothers at Plush, Oregon, from which the cattle involved in this case were moved. (Respondent kept cattle on a number of different tracts of land owned by the Lynch Brothers.) I accept the ALJ's findings in this respect. Also, I accept the ALJ's finding that the cattle were not in fact subjected to an official test for brucellosis within 30 days prior to their movement.

Findings of fact by ALJs are consistently given great weight by the Judicial Officer. As stated in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 407-09 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988):

> The superior advantages of the ALJ, who saw and heard the witnesses testify, for determining their credibility, including determining the expertise and credibility of expert witnesses, is well recognized. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:
>
> > Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". N.L.R.B. v. Universal Camera Corp., 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their

credibility, and so for ascertaining the truth." Ohio Associated Tel. Co. v. N.L.R.B., 6 Cir., 192 F.2d 664, 668.

> . . . In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." Jennings v. Murphy, 7 Cir., 194 F.2d 35, 36.
>
> It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. N.L.R.B. v. Universal Camera Corp., supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

> The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. Great Western Food Distributors v. Brannan, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States v. Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Accord Blackfoot Livestock Comm'n Co. v. USDA, 810 F.2d 916 (9th Cir. 1987).

The status of findings of fact by an ALJ were discussed in *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. ____, slip op. at 17-20 (Apr. 29, 1988), as follows:

> [I]t is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's, since they have the opportunity to see and hear the witnesses. However, the ALJ's findings are not sacrosanct, and I am entirely free to substitute my judgment for that of the hearing officer on all questions. It is important to note here that where there is the possibility of drawing two inconsistent inferences from the evidence, I am not prevented from drawing one. Also, the overruling of an ALJ's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. If my inferences are supported by substantial evidence, they cannot be set aside even though the reviewing court could draw a different inference. When I reach different or opposite results from the ALJ, the ALJ's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. Where I have overruled an ALJ's findings, in many cases, based upon credibility determinations, I have relied on documentary evidence or inferences from the facts. The points and authorities for this statement of law and practice on the reversal of an ALJ's findings were recently restated in *In re Collins*, 46 Agric. Dec. [217, 227-29 (1987)], as follows:
>
> > It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJs since they have the opportunity to see and hear the witnesses testify (footnote omitted). When an agency *adopts* findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot*

Livestock Comm'n Co. v. USDA, [810 F.2d 916, 920-21 (9th Cir. 1987)]. As stated in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

> Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, ·ding questions that depend upon demeanor of ·s, and even despite the hearing officer's of the witnesses. The law that had been ·efore the APA continues: "Even on a the credibility of contradictory witnesses, ing the advantage the examiner has of seeing hem testify, the Board may differ from the its examiner." NLRB v. Tex-O-Kan Flour d 433, 437 (5th Cir. 1941).
>
> rofessor Davis explains that an agency can 's findings based on credibility determinations ıether a very substantial preponderance of the s the agency's decision. He states (*id.* at 332) ox doctrine" consistent with Supreme Court orth in *Adolph Coors Co. v. FTC*, 497 F.2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

> The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*
>
> The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

Accord Blackfoot Livestock Comm'n Co. v. USDA, [810 F.2d 916, 920-21 (9th Cir. 1987)].

In the present case, I agree fully with the ALJ's findings and conclusions. The civil penalty assessed here is modest considering the importance of the

Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. 66, 109 (1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million [$63 million in 1987 (Tr. 8)] a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. 1406, 1409-10 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

---

[4]Brucellosis is "disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's New International Dictionary, Unabridge (1981), at 285).

> For many years, the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 C.F.R. § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.
>
> In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 C.F.R. Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

Order

Respondent is hereby assessed a civil penalty of $9,000. Respondent shall send a certified check or money order for $9,000 payable to the "Treasurer of the United States," to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within 60 days after service of this Order.

APPENDIX

Oral Decision by Judge McGrail at Hearing
held July 13-14, 1988, Reno, Nevada,
Transcript, Pages 195-197

As I stated earlier, I have had the opportunity to review all the exhibits in the record; and from notes I have taken during this hearing, I am able to assess the testimony. That, together with your arguments and statements today, I have decided to issue a bench decision.

As a preface to my decision, I will first make a statement of the law and the regulations.

Sections 111 and 120 of Title 21 of the United States Code, authorize the Secretary to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle. Section 122 of Title 21 of the United States Code provides for the assessment of not more than $1,000 for each violation of the regulations issued by the Secretary pursuant to the authority invested in him in Sections 111 and 120 of Title 21, U.S. Code.

Section 71.18 of the regulations, 9 C.F.R. § 71.18, promulgated by the Secretary pursuant to the above authority requires, as pertinent here, that cattle 2 years of age, or over, and moved interstate other than directly to slaughter or to a quarantined feedlot must be accompanied by an owner's statement, or other document, showing the point of origin, the destination, the number of animals covered by the statement, the name and address of the owner or shipper, and the identifying numbers of the backtags or other approved identification.

Section 78.9, 9 C.F.R. § 78.9, requires that cattle be subjected to an official blood test within 30 days prior to movement and be accompanied by a certificate showing the dates and results of the tests.

Thus, the issues here are whether respondent moved interstate from Oregon to California 52 cattle on January 18, 1985, 364 cattle on January 19, 1985, and 156 cattle on January 20, 1984, 1) without being accompanied by an owner's statement or other document as required, 2) without the cattle being subjected to an official test for brucellosis and without being accompanied by a certificate as required in violation of 9 C.F.R. §§ 71.18 and 78.9(b)(3)(ii).

There is no doubt but that complainant has shown by testimony and documentary evidence that the cattle were moved interstate in the amount and on the dates cited in the complaint and that they were owned and caused to be moved by respondent. The brand inspection certificates, the livestock freight bills and the daily interstate highway passing reports for the California points at Alturas and Mt. Shasta plainly show this and are corroborated by testimony. There is nothing in this record which corroborates Mr. Belaustegui's argument that the shipments were moved from one pasture leased by respondent to another pasture leased by him. So the movement does not fall within the exception cited by Mr. Belaustegui.

The record is also clear that the cattle involved here were not brucellosis tested before shipment.

Therefore, I find that each of the allegations cited in the complaint have been proved in this record. When a violation is shown, there are no mitigating circumstances which can be shown.

As to the sanction to be imposed, severe sanctions have been established in *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974) and elaborated upon in *In re Donald Hagemand, S&H Hogs, Inc., et al.*, 42 Agric. Dec. 531, 546 (1983).

Although mitigating circumstances may be considered in imposing a sanction, I find none to exist here. Therefore, I am imposing a $1,000 civil penalty for each of the allegations shown and proven in this record.

In re: HARRY L. FLOYD.
A.Q. Docket No. 88-9.
Decision and Order filed February 14, 1989.

Interstate movement of cattle.

The Judicial Officer affirmed Judge Baker's order assessing civil penalties of $4,000 for violating the Act of February 2, 1903, and regulations governing the interstate movement of cattle. Intent is not an element of respondent's violations. The penalties are modest considering the importance of the Brucellosis Eradication Program.

Christine O'Leary, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122), for violations of the Act and the regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*), governing the interstate movement of cattle. An initial Decision and Order was filed November 10, 1988, by Administrative Law Judge Dorothea A. Baker (ALJ) assessing civil penalties of $4,000.

On December 12, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[1] The case was referred to the Judicial Officer for decision on February 3, 1989.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (Act), for a violation of the regulations issued under the Act that govern the interstate movement of cattle because of brucellosis (9 C.F.R. § 78.1 *et seq.*), hereinafter referred to as the regulations.

This proceeding was instituted by an amended complaint filed on August 10, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The amended complaint alleged that on or about June 2, 1986, the respondent moved at least four (4) cows, over twenty-four months of age, interstate from Russellville, Alabama to Savannah, Tennessee, in violation of section 78.9(c)(3) of the regulations (9 C.F.R. § 78.9(c)(3)), because the cattle were not accompanied by a certificate, as required. Also, that on or about June 2, 1986, the respondent moved at least four (4) cows, over twenty-four months of age, interstate from Russellville, Alabama to Savannah, Tennessee, in violation of section 78.9(c)(3) of the regulations (9 C.F.R. § 78.9(c)(3)), because the cattle were not accompanied by a permit for entry, as required. In addition, the amended complaint alleged that on or about September 30, 1986, the respondent moved approximately three (3) brucellosis reactor cattle interstate from Florence, Alabama to Waynesboro, Tennessee, in violation of section 78.7(a)(1) of the regulations (9 C.F.R. § 78.7(a)(1)), because the cattle were not moved directly to a recognized slaughtering establishment, as required. Finally, on or about September 30, 1986, the respondent moved approximately two (2) cattle interstate from Florence, Alabama to Waynesboro, Tennessee in violation of section 78.8(a)(1)(i) of the regulations (9 C.F.R. § 78.8(a)(1)(i)), because the cattle were not moved directly to a recognized slaughtering establishment, as required.

In response to the amended complaint, respondent filed a letter dat August 30, 1988, affirming his admission of the violations in Counts II and as set forth in his July 25, 1988 letter filed in response to the amend complaint. However, respondent failed to deny or otherwise respond to t allegations in Counts IV and V. In accordance with section 1.136(c) of t Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwi respond to an allegation in the amended complaint is deemed, for t purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent is deemed to ha admitted the material allegations in the complaint, and, therefore, responder has waived his right to a hearing pursuant to section 1.139 of the Rules Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issue pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to th proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the amended complaint, whic respondent is deemed to have admitted, are adopted and set forth herein a the findings of fact.

Findings of Fact

1. Respondent, Harry L. Floyd, is an individual whose address is 41 Market Street, Waynesboro, Tennessee 38485.

2. On or about June 2, 1986, the respondent moved at least four (4) cows over twenty-four months of age, interstate from Russellville, Alabama tc Savannah, Tennessee, in violation of section 78.9(c)(3) of the regulations (9 C.F.R. § 78.9(c)(3)), because the cows were not accompanied by a certificate, as required.

3. On or about June 2, 1986, the respondent moved at least four (4) cows, over twenty-four months of age, interstate from Russellville, Alabama to Savannah, Tennessee, in violation of section 78.9(c)(3) of the regulations (9 C.F.R. § 78.9(c)(3)), because the cows were not accompanied by a permit for entry, as required.

4. On or about September 30, 1986, the respondent moved approximately three (3) brucellosis reactor cattle interstate from Florence, Alabama to Waynesboro, Tennessee, in violation of section 78.7(a)(1) of the regulations (9 C.F.R. § 78.7(a)(1)), because the cattle were not moved directly to a recognized slaughtering establishment.

5. On or about September 30, 1986, the respondent moved approximately two (2) brucellosis exposed cattle interstate from Florence, Alabama to Waynesboro, Tennessee, in violation of section 78.8(a)(1)(i) of the regulations (9 C.F.R. § 78.8(a)(1)(i)), because the cattle were not moved directly to a recognized slaughtering establishment, as required.

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and sections 78.9(c)(3), 78.7(a)(1) and 78.8(a)(1)(i) of the regulations promulgated thereunder (9 C.F.R. §§ 78.9(c)(3), 78.7(a)(1) and 78.8(a)(1)(i)). Therefore, the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the civil penalties should be reduced because the violations were not intentional, but intent is not an element of respondent's violation of the administrative regulations. The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. 66, 109 (1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million [$63 million in 1987 (Tr. 8)] a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. 1406, 1409-10 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

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[4]Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by a great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years, the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some

entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 C.F.R. § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 C.F.R. Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

Order

Respondent is hereby assessed civil penalties of $4,000 ($1,000 per violation). Respondent shall send a certified check or money order for $4,000 payable to the "Treasurer of the United States," to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within 60 days after service of this Order.

In re: PAUL BROWN.
A.Q. Docket No. 340.
Decision and Order filed March 3, 1989.

Interstate movement of cattle - Brucellosis program explained.

ucellosis program is explained. Respondent moved cattle interstate without a
r entry or an "S" brand permit. Policy of the Department to impose severe
violations of the regulations.

nplainant.

ernstein, Administrative Law Judge.

ling for the assessment of civil penalties
the Act of February 2, 1903, as amended
, and the regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*) in accordance with the applicable Rules of Practice (9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*) This proceeding was instituted by a Complaint filed on September 29, 1987, by the Administrator

of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent filed an Answer on October 27, 1987.

The Complaint alleged that on or about August 8, 1985, Respondent moved six cattle over 24 months of age interstate from Idabell, Oklahoma to Ladonia, Texas, in violation of section 78.9(c)(l) of the regulations (9 C.F.R. § 78.9(c)(l)) in that the cattle were not accompanied interstate by an "S" brand permit and had not been tested and found negative to an official test for brucellosis immediately prior to the interstate movement. Respondent admitted that on or about August 8, 1985, when he was moving the six cattle that were over 24 months of age from Idabell to Ladonia, Respondent had the necessary permit in testing for the cattle, but the documents were six miles away from where Respondent was stopped but Respondent was not permitted to produce the document.

The Complaint also alleged that on or about January 15, 1986, Respondent moved at least one cow over 24 months of age interstate from Sulphur Springs, Texas to Antlers, Oklahoma, in violation of § 78.9(d)(3) of the regulations (9 C.F.R. § 78.9(d)(3)) in that the cow was not accompanied interstate by a certificate and permit of entry, as required. Respondent's Answer admitted that one cow over 24 months of age was moved from Sulphur Springs to Antlers on that date and stated that the cow had been tested negatively for brucellosis immediately before the move and immediately after the move; that at the time the cow left Sulphur Springs, it was late at night upon the conclusion of the Sulphur Springs sale and a veterinarian was not available to issue the certificate and permit for entry for the cow; and because the cow had been tested at the time of shipment and arrival, there was no danger that the cow would spread any disease.

Complainant also alleged that on or about January 22, 1986, Respondent moved at least four cattle, over 24 months of age interstate from Sulphur Springs to Antlers in violation of § 78.9(d)(3) of the regulations (9 C.F.R. § 78.9(d)(3)) in that the cattle were not accompanied interstate by certificate and a permit for entry as required. Respondent admitted that the four cattle over 24 months of age were moved from Sulphur Springs to Antlers on that date; stated that the cattle had been tested negative for brucellosis immediately after they were moved from Texas and shortly after their arrival in Oklahoma; and that the time the cattle left Sulphur Springs, it was late at night upon the conclusion of the Sulphur Springs sale and a veterinarian was not available to issue the certificate and permit for entry for the cattle; and that because the cattle were tested at the time of shipment and upon arrival, there was no danger that the cattle would spread disease.

The Complaint also alleged that on or about February 3, 1986, Respondent moved at least two cattle over 24 months of age interstate from Sulphur Springs to Antlers in violation of § 78.9(d)(3) of the regulations (9 C.F.R. § 78.9(d)(3)) in that the cattle were not accompanied interstate by a certificate and permit of entry, as required. Respondent's Answer admitted that the two cattle over 24 months of age were moved from Sulphur Springs to Antlers on that date; it stated that the cattle had been tested negative for brucellosis

immediately before the move from Sulphur Springs and upon their arrival at Antlers; that at the time the cattle left Sulphur Springs it was late that night upon the conclusion of the Sulphur Springs sale and a veterinarian was not available to issue the certificate and permit of entry for the cattle; and that because the cattle were tested at the time of shipment and upon arrival, ther was no danger that the cattle would spread disease.

A hearing was held before me in Dallas, Texas. Robert B. Sanders, Kent Graves, David Lee Lyles, David B. Green, and Clifton Long testified for Complainant. David Leslie and Respondent Paul Brown testified for Respondent.

Complainant filed proposed findings of fact, proposed conclusions of law, and a brief. Respondent did not file any proposed findings, proposed conclusions or brief. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact and Conclusions of Law

Dr. Robert B. Sanders, a Doctor of Veterinary Medicine and a Regional Epidemiologist for the Department of Agriculture testified about brucellosis and the Department of Agriculture's program for that disease. Dr. Sanders testified knowledgeably and without contradiction and I find his testimony to be accurate. He testified to the following.

Brucellosis is a bacterial disease of most warm blooded animals, including humans. It is transmitted from an infected cow at the time that she calves or aborts. The brucellosis program is a Federal-State program. State and Federal employees work together toward the goal of eradicating brucellosis An animal that is identified as a reactor is tagged with a coded tag which is placed on the animal's back or shoulder. States are classified based on the prevalence of brucellosis. Many northern states are classified as free of brucellosis. Other states are classified as Class A, if they have little brucellosis; Class B, if they have more than Class A; and Class C, which describes states having the greatest prevalence of the disease. It is very difficult to successfully treat animals with brucellosis. The program calls for slaughter of infected animals. At the applicable times herein, Texas was a B/C state. The western part of Texas was classified as B. Most of the eastern part of the state was classified as C. Oklahoma, which borders the eastern part, is classified as B. Hopkins County, in the eastern part of the state, is a C area during 1985 and 1986. (TR 9-14)

The regulations require during 1985 and 1986 that breeding animals that go from east Texas, a C area, to Oklahoma, a B state, be tested twice at 60-day intervals before they are allowed to move. When moved from east Texas to Oklahoma, they must be accompanied by a health certificate and a permit. The health certificate would show the identification of the cattle, where they

were coming from, where they were going, the date of movement, and the reason for movement. All animals that are 24 months of age or older require to be tested for brucellosis and to be accompanied by this paperwork when moving interstate. Cows would be identified by ear tags which contain individual 9-digit numbers. If a cow tests negative for brucellosis, it means that on that date, the cow's immune system is not producing sufficien quantities of antibodies to cause the test to be positive. It does not mean that the cow does not have brucellosis. There is a variation in the incubation period of the disease for various animals. (TR 15-18)

The brucellosis program, which began in 1934, as a voluntary program, has been a tremendous success. Brucellosis has been eradicated in more than 20 states in the north and west. Another large group of states is classified as Class A which means they have very little brucellosis. There are, however, a few states that have the majority of brucellosis problems. These are the B and C states. In Texas, for example, approximately 7,000 known herds were infected with brucellosis in 1970. By 1987, only about 1600 herds were infected in that state. (TR 19)

Since 1963, the program has cost the Federal Government in excess of a billion dollars. Additional costs have been incurred by the states. In addition, the program costs producers such as cattlemen approximately $619,000,000, costs dairymen over $1,000,000, and costs beef producers over $15,000,000. Although the program is costly, it has been quite successful. Dr. Sanders indicated that Canada's cattle is free of brucellosis and he believes that through this program we are going to eradicate brucellosis or have such a low level that it will not be a problem. (TR 7, 20-21)

Respondent Paul Brown's mailing address is Route 2, Antlers, Oklahoma 74523.

On or about August 8, 1985, Respondent moved six cattle over 24 months of age, interstate, from Idabell, Oklahoma to Ladonia, Texas. The cattle were not accompanied interstate by an "S" brand permit. (Answer para. II; TR 5) Kent Graves, an investigator with the Texas Animal Health Commission, was operating a Highway 271 checkpoint just north of Paris, Texas, and was checking health papers on cattle being transported from Oklahoma into Texas. (TR 28-29) The checkpoint was marked by yellow signs, at least three feet square, with black lettering. One sign was placed about one-half mile before the vehicle stop area and announced that all livestock vehicles must stop ahead. The vehicle stop area was marked by another sign and orange flags. On that date, Respondent, who was accompanied by Donald Leslie and transporting eight cows on a truck, failed to stop at the checkpoint. Mr. Graves pursued him, turned on his red light and Respondent pulled to the side of the road approximately one-half to one mile beyond the checkpoint. Mr. Graves discovered that six of the eight cows were "S" branded. (TR 29-33) The "S" branding of cattle is a means of designating them as brucellosis-exposed. (9 C.F.R. § 78.8)

Respondent told Mr. Graves that although he saw the checkpoint signs, he did not stop because he did not realize that anyone was at the checkpoint. (TR 30, 102) Respondent admitted that he did not have any of the papers required for the cattle and that he was aware that he was supposed to have the papers in his possession. (TR 30) Mr. Graves filled out a VS Form 1-27 (CX 2) to authorize the further movement of the cattle to a slaughter house but Respondent refused to sign the form. (TR 33-34)

The paper that should have accompanied the shipment is an "S" brand permit, as is required by 9 C.F.R. § 78.9(e)(1)(ii). Respondent and Leslie explained to Graves that they had the papers approximately six miles away and they asked Graves if they could go back and obtain the papers. Graves, angry at being forced to pursue Respondent, refused to let Respondent go back for the papers and refused to waive the violation. On some prior occasions, Graves had allowed Respondent to bring in papers the next day but because these were "S" branded or brucellosis-exposed cattle he did not allow this on this occasion. (TR 42)

On or about January 15, 1986, Respondent moved at least one cow over 24 months of age interstate from Sulphur Springs, Texas to Oklahoma, in violation of § 78.9(d)(3) of the regulations in that cow was not accompanied by a permit of entry as required.

On or about January 22, 1986, Respondent moved at least four cattle, over 24 months of age, interstate from Sulphur Springs, Texas to Oklahoma, in violation of § 78.9(d)(3) of the regulations in that the cattle were not accompanied interstate by certificate and a permit of entry as required.

On or about February 3, 1986, Respondent moved at least two cattle over 24 months of age interstate from Sulphur Springs, Texas to Oklahoma, in violation of § 78.9(d)(3) of the regulations in that the cattle were not accompanied interstate by a certificate and by a permit of entry as required.

The stipulations of the parties and the evidence established that Respondent transported on or about January 15, 22 and February 3, 1986, at least one, four, and two cows respectively all over 24 months of age from Sulphur Springs, Texas to Oklahoma. (Para. 3-5 of Respondent's Answer; TR 6) David Archer testified that he purchased the Texas cattle from Respondent (TR 51) and that he received no paperwork for this shipments. (TR 57, 89).

Among 44 cattle tested by Mr. David Lyles, a U.S. Department of Agriculture animal health technician, on March 24, 1986, (Exhibit 7) were the following cows identified by eartag number and age (TR 53-56):

	Eartag #	Age (years)
(1)	74VEY3469	5
(2)	74BCS0367	5
(3)	74BZS0386	5
(4)	74BYD9572	10
(5)	74BYD9571	4
(6)	74BVP9578	3
(7)	74BZR7405	5
(8)	74BZS2208	6

USDA Investigator David Green was successful in locating these eight cows in the January and February 1986 records for Sulphur Springs Livestock Commission and Jones Livestock Auction, both of which are located in Sulphur Springs, Texas (TR 77). He was able to ascertain the exact sale date and purchaser as follows (TR 78-82, CX 8-13).

Eartag #	Market	Sale Date	Purchaser
(1) 74VEY3469	Sulphur Springs	2/3/86	Paul Brown
(2) 74BCS0367	" "	"	
(3) 74BZS0386	" "	"	"
(0383)*	" "	"	"
(4) 74BYD9572	Jones	1/22/86	"
(5) 74BYD9571	" "	"	
(6) 74BVP9578	"	"	"
(7) 74BZR7405	"	1/15/86	"
(8) 74BZS2208	"	1/22/86	"

*The cow identified by tag #74BZS0386 is incorrectly identified as tag #74BZS0383 on page 3 of VS Form 4-54 (Ex. 12) for the Sulphur Springs sale date of February 3, 1986.

George W. Gray, veterinarian for the Jones Livestock Commission, swore by affidavit that he doesn't remember issuing health certificates to Respondent for the sale dates of January 15 and 22, 1986. (TR 83, CX 14) Wayne Parker, veterinarian for the Sulphur Springs Livestock Commission, having conducted a records search, swore by affidavit that he could find no health certificate issued to the Respondent for the sale date of February 3, 1986. (TR 83, 8, CX 15) Barbara L. Pearman, Supervisor of Records Section for the Oklahoma Department of Agriculture, having the examined appropriate records for January-February 1986, certified by affidavit that she could locate neither health certificates issued in Respondent's name for Texas cattle consigned to

Oklanoma nor permits for entry in tbe name of Respondent (or Gerald Archey) for cattle shipped from Texas to Oklahoma. (CX 17, 18). Respondent gave USDA Compliance Officer, Clifton R. Long, a sworn affidavit that he, Paul Brown, bought subject cattle for Gerald Archey. (CX 16, TR 90)

I, therefore, fiod that Respondent has committed seven distinct violations. Each of these violatioos is subject to a maximum civil penalty of $1,000.00 (21 U.S.C. § 122) Complainant requested that Respondent be assessed with the maximum penalty for each violation.

It is no defense to the August 8, 1985, violation tbat Mr. Graves did not permit Respondent to go six miles to obtain the paperwork. Respondent knew that he was required to have the paperwork with him in order to transport the cattle from Oklahoma to Texas. Nor is it a defcnse to the violatioos of January 15, January 22, and Febnuary 3, 1986, tbat Respondent had difficulties in locating veterinarians needed to prepare the necessary papers.

It is the policy of the Department of Agriculture to impose severe sanctions for serious violations of the regulatory laws administered by the Department. *In re Braxton M. Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974); *In re Donald Hageman*, 42 Agric. Dec. 531, 546 (1983). The brucellosis program is an important program to protect the health of agricultural animals. Violatioos of regulatioos in connection with that program are serious. The violations in this case were repeated. For example, in Jaouary and Febnuary 1986, Respondent over a period of two months gradually accumulated cows that became Gerald Archey's herd. He bought cattle at various times and places in Texas and transported them to Oklahoma. In nonc of these occasions did he acquire health certificates or permits for entry.

Accordingly, I find that the assessmeot of a $1,000.00 civil penalty against Respondent for each of the seven violations is appropriate to accomplish the goals of compliance and deterrence.

Order

Respondent, Paul Brown, is assessed a civil penalty of $7,000.00 which shall be made payable to the "Treasurer of the United States" by certified check or money order and which shall bc forwarded within 30 days from the effective date of this Order to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

This Order shall become final and effective 35 days after service of this Decision and Order upon Respondeot, unless there is an appeal to the Judicial Officer pursuant to § 1.145 of the applicable Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final April 18, 1989.-Editor.]

In re: JEROME LIES, d/b/a L & L CATTLE CO.
A.Q. Docket No. 335.
Order on Motion to Dismiss filed March 8, 1989.

Sheila Hogan Novak, for Complainant.
Richard Benjes, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Because of the death of Respondent Leo Lies, Complainant's Motion to Dismiss the action against Leo Lies is granted. The caption of this case is changed to delete Leo Lies' name.

In re: THOMAS M. LOPER.
A.Q. Docket No. 50.
Decision and Order filed April 11, 1989.

Interstate movement of cattle without owner/shipper statement, certificate and entry permit - Consent.

Sheila H. Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*). An amended complaint, filed on January 21, 1988, alleged that on or about June 30, 1983, the respondent moved interstate three cows from Mississippi to Alabama in violation of sections 71.18 (a), 78.5 and 78.9 (d)(3)(iii) of the regulations (9 C.F.R. §§ 71.18 (a), 78.5 and 78.9 (d)(3)(iii)) because the cattle were moved without an owner or shipper statement containing prescribed information and without a certificate. The amended complaint further alleged that on or about December 9, 1983, the respondent moved interstate one bull from Alabama to Mississippi in violation of sections 78.5 and 78.9 (c)(3)(ii) of the regulations (9 C.F.R. §§ 78.5 and 78.9 (c)(3)(ii)) because the bull was moved without a certificate or permit for entry. Finally, the amended complaint alleged that on or about May 12, 1986, the respondent moved interstate two cows from Alabama to Mississippi in violation of sections 78.5 and 78.9 (c)(3)(ii) of the regulations (9 C.F.R. §§ 78.5 and 78.9 (c)(3)(ii)) because the cattle were moved without a certificate or permit for entry. The respondent filed an answer on February 9, 1988, in which the allegations of the amended complaint were denied.

Immediately prior to the commencement of the hearing in this matter, which was scheduled on April 3, 1989, in Washington, D.C., the respondent consented to the terms set forth in the following order. Thereafter, the hearing was convened and the order was read into the record.

Findings of Fact

1. Thomas M. Loper (AKA "Red" Loper), respondent, is an individual whose address is General Delivery, Millry, Alabama 36558.

2. On or about June 30, 1983, respondent moved interstate three cows from Mississippi to Alabama.

3. On or about December 9, 1983, respondent moved interstate one bull from Alabama, to Mississippi.

4. On or about May 12, 1986, respondent moved interstate two cows from Alabama to Mississippi.

Conclusion

The respondent having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued

Order

The respondent is hereby assessed a civil penalty of one thousand five hundred dollars (1,500.00). The civil penalty shall be payable as follows: $500.00 on or before May 1, 1989, and $50.00 by the first of each month for 20 months thereafter. The payments shall be made by certified check or money order, payable to the "Treasurer of the United States" and shall be mailed to the U.S. Department of Agriculture, APHIS Field Servicing Office Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street Minneapolis, Minnesota 44503.

The respondent shall indicate on the certified check or money order that the payments are in reference to A.Q. Docket No. 50. This order shall become effective on the day upon which service is made upon the respondent.

[This Decision and Order became final May 18, 1989.-Editor]

ANIMAL WELFARE ACT

COURT DECISION

JAMES W. HICKEY, d/b/a S&S FARMS and S. S. FARMS, INC.
Docket No. 88-7281 and AWA No. 369.
Decided June 26, 1989.

Suspension and civil penalty affirmed - Adequate notice for due process - AWA applies to all animals on dealers' premises - AWA requires maintenance of accurate records.

Suspension of dealer's license and an assessment of $40,000 civil penalty by the Secretary was supported by substantial evidence in the record. Notice is adequate for due process purposes if the party proceeded against understood the issue and was afforded a full opportunity to respond. USDA policy is to require compliance with the AWA as to all animals found on the premises of a dealer, even the dealer's pets, because of the possibility that the pet might be sold at a later date. AWA requires dealers to maintain accurate records. AWA does not require the Secretary to prove that the purpose of inaccurate record keeping was to disguise the theft of animals.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM* OPINION

James W. Hickey ("Hickey") appeals a decision by the Secretary of Agriculture ("Secretary") suspending Hickey's license for 25 years and fining him $40,000 for violations of the Animal Welfare Act ("Act"). We affirm.

Facts

Hickey was a licensed Class B dealer under the Act, in the business of selling cats and dogs to be used in research. After sending Hickey a warning letter on December 20, 1983, regarding deficiencies observed during an inspection of Hickey's premises, the Animal and Plant Health Inspection Service ("APHIS") commenced further investigations running from October 3, 1984 to July 23, 1985. These investigations disclosed filthy and inhumane conditions at Hickey's premises, reporting violations and tagging violations. During one of these investigations, Hickey refused access to records concerning a stolen black labrador puppy.

The ALJ found that each of these acts, omissions and conditions violated specific regulations and standards promulgated under the Act. The ALJ

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Hickey's various violations and imposed specific penalties for ea
totalling $40,000. Hickey's license was suspended for 25 years. The Judi
Officer ("JO"), acting on behalf of the Secretary, reviewed the AL
preliminary decision and sustained all of the ALJ's rulings. Hickey petitic
this Court for review of the Secretary's findings. We have jurisdiction und
7 U.S.C. § 2149(c).

Analysis

The findings of the Secretary in this adjudicatory administrative proceedi
must be upheld if supported by substantial evidence in the record as a whol
See Spencer Livestock Comm'n v. Dept. of Agriculture, 841 F.2d 1451, 1456 (9
Cir. 1988). Hickey challenges five of the Secretary's findings.[1] The
challenges will be discussed in turn.

1. Finding 14

Hickey argues that Finding 14, concerning inhumane conditions at H
facilities on November 14, 1984, involved the conditions in which Hickey kep
one of his personal dogs. However, the testimony of the APHIS inspecto
indicated that the conditions underlying Finding 14 were found throughou
Hickey's facilities. The dog which Hickey alleges belonged to him personall
was depicted in an exhibit showing the inadequate drainage at Hickey's
facilities. Inadequate drainage was only one of nine violations found on
November 14, 1984. There was also evidence that other animals, which
Hickey does not claim belonged to him personally, were exposed to
inadequate drainage conditions. *See* R.T. 153 (cat facility contained excess
water, cats muddy and wet). The dog which Hickey claims was his was not
depicted in exhibits used to prove the other violations in Finding 14. This
finding must be affirmed.[2]

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[1] Hickey also purports to appeal the entire $40,000 penalty and suspension of his license as an abuse of discretion, designating the entire record, without specifying any particular findings as erroneous. We decline this invitation to undertake *de novo* review of the entire proceedings, limiting ourselves to consideration of Hickey's more specific assignments of error.

[2] There is no reason to assume that this finding could be reversed even if it did apply only to Hickey's personal dog. Hickey offers no legal support for his conclusion that the Act does not apply to a dealer's personal pets, at least those kept together with animals to be sold. At Hickey's hearing, an APHIS inspector testified that USDA policy is to require compliance as to all animals found on the premises, even the dealer's pets, because of the possibility that a dealer might determine to sell a pet at some later date.

2. Finding 11

In Finding 11, the ALJ assessed a $1,000 civil penalty for Hickey's refusal to allow access to records to show the ownership of a black labrador puppy. There was evidence that the puppy had been stolen, that the owner had traced it to Hickey's premises, and that Hickey had returned the puppy to its owner. R.T. 89. Hickey gave the owner a receipt. *Id.* During an inspection, Hickey was unable or unwilling to produce any records concerning the puppy. The very absence of records is a violation of the Act and regulations sufficient to trigger a $1,000 fine. 7 U.S.C. §§ 2140; 2149(b); 9 C.F.R. § 2.75.

3. Finding 16(e)

Hickey alleges that Finding 16(e) was not pled in the Department of Agriculture's complaint, and that it was therefore improper for the ALJ to impose a penalty on him based on this finding. This finding reads, "One overly aggressive dog was housed in an enclosure with many other dogs." Inadequate notice is grounds for reversing an agency's decision. *Dept. of Education of California v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988). Notice is adequate for due process purposes if the party proceeded against understood the issue and was afforded a full opportunity to justify his conduct. *Id.*

This violation was brought to Hickey's attention for the first time in exhibits furnished him prior to the hearing. One of the exhibits states, with respect to an inspection on March 13, 1985:

> Deficiency #39 Classification and Separation -- An aggressive dog was removed from other dogs during the inspection.

C.X. 17. At the hearing, APHIS filed a proposed finding identical in all essentials to Finding 16(e). The violation was discussed in APHIS' post-hearing brief. Nevertheless, Hickey never requested a continuance to meet this evidence, nor does Hickey allege that the finding is not supported by the evidence. Hickey had ample opportunity to object to the inclusion of the unpled violation. We conclude that notice was adequate and affirm this finding.

4. Finding 19

The ALJ concluded that Hickey falsely reported the dollar amount of sales on his annual license report for the year July 22, 1983 to July 22, 1984. Hickey reported total sales of $9,460, with the dollar amount on which his fee

was based indicated as $4,230. R.T. 36, C.X. 1, page 4. There was evidence of purchases by three institutions totalling at least $26,740.[3] By underreporting his sales, Hickey necessarily underrepresented the amount on which his license fee was to be based. 9 C.F.R. §2.6(b)(2) (license fee based on gross sales minus the amount paid for the animals).

Hickey also alleges that the Secretary was required to produce evidence of the amount Hickey paid for the animals in order to prove that the license renewal form was false. However, Hickey himself provided this figure on the renewal form. C.X. 1 at page 4.

5. Finding 7

The Secretary found that Hickey falsely reported the number of dogs purchased from dog shelters. The Secretary cites evidence of a plethora of discrepancies. Respondent's Brief 14-17. Hickey does not attempt to dispute that such discrepancies occurred. He argues only that there was no evidence he stole dogs and no evidence that his record keeping was willfully inaccurate.

7 U.S.C. § 2140 and 9 C.F.R. § 2.75 require dealers to maintain accurate records. 7 U.S.C. § 2149(b) provides for penalties in the case of any violation, willful or not, with "due consideration to. . .the person's good faith, and the history of previous violations." Nowhere does the Act require the Secretary to prove that the purpose of inaccurate record keeping was to disguise the theft of animals. The ALJ gave proper consideration to circumstances, imposing penalties only for violations which occurred after Hickey received a letter of warning, and increasing the penalties for later violations. PR-15.

Conclusion

The Order of the Department of Agriculture suspending Hickey's license for 25 years and fining him $40,000 is AFFIRMED.

In re: SUE COUSETTE.
AWA Docket No. 88-15.
Order filed March 9, 1989.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

For good cause shown, and upon the motion of the complainant, it is ordered that the complaint be and hereby is, dismissed, without prejudice.

In re: LYDIA ANDERSON.
AWA Docket No. 427.
Supplemental Order filed June 5, 1989.

Robert Ertman, for Complainant.
Pamela J. Gooden, for Respondent.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's license as a dealer under the Animal Welfare Act, as amended, contained in the Order issued in this case on March 28, 1988, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

In re: CARL MARKUM, TOMMY HOWELL, AND DAVID DUPES.
HPA Docket No. 88-41.
Order filed February 10, 1989.

Robert Ertman, for Complainant.
G. Thomas Blankenship, for Respondents.
Order issued by James Hunt, Administrative Law Judge.

Upon the motion of complainant and for good cause shown, the complain is dismissed as to respondent Tommy Howell.

In re: ROBERT GREGORY PATE, et al.
HPA Docket No. 88-60.
Order Dismissing Complaint as to Charles Brown filed February 27, 1989

Donald Tracey, for Complainant.
Respondents, Pro se.
Order issued by Edwin Bernstein, Administrative Law Judge.

Complainant has moved to dismiss the Complaint in this matter as t Charles Brown.

For good cause shown, it is ordered that the complaint against Charle Brown in this matter is hereby dismissed without prejudice.

PLANT QUARANTINE ACT

In re: JULIO FRANCISCO.
P.Q. Docket No. 88-21.
Order Vacating Decision and Order filed February 13, 1989.

Sheila Novak, for Complainant.
Respondent, Pro se.
Order issued by Donald A. Campbell, Judicial Officer.

On December 27, 1988, complainant moved to vacate the Decision and Order entered in this proceeding on November 10, 1988, by Administrative Law Judge Dorothea A. Baker, assessing a civil penalty of $375 against respondent for importing one mango into the United States from the Dominion Republic, in violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), and the regulations issued thereunder (7 C.F.R. § 319 *et seq.*), on the ground that the respondent did, in fact, pay a $50 penalty to the United States Customs Service. On December 28, 1988, respondent appealed to the Judicial Officer, on the same ground. Accordingly, the following order should be issued.

Order

The Decision and Order previously filed in this proceeding is hereby vacated, and the complaint is dismissed, with prejudice.

In re: WILFRED CHOW.
P.Q. Docket No. 317.
Decision and Order filed March 3, 1989.

Improper use of USDA inspection stickers.

Respondent, an employee at Hickam Air Force Base, Honolulu, Hawaii, illegally placed USDA inspection stickers on luggage that had not been inspected by USDA personnel.

Jaru Ruley, for Complainant.
Philip D. Bogetto, for Respondent.
Decision and Order issued by Edwin Bernstein, Administrative Law Judge.

This administrative proceeding under the Plant Quarantine Act of August 12, 1912, as amended (7 U.S.C. § 161 and 162), ("the Act") and the regulations thereunder (7 C.F.R. § 318.13 *et seq.*) was instituted by a Complaint filed on March 20, 1987, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint

alleges that on or about August 16, 1986, at Hickam Air Force Base, Honolulu, Hawaii, Respondent Wilfred Chow checked 10 bags bearing Military Airlift Command claim tag numbers and not having been inspected and passed, as required, on a flight to the Continental United States in violation of 7 C.F.R. § 318.13-10 and 318.13-12(a). In the Answer filed on April, 7, 1987, Respondent denied the allegations. A hearing was held before me in Honolulu, Hawaii on October 18, 1988. Elliott Crooks, Edward S. Shiroma, and Steven Chow testified for Complainant. Patrick Jennings, David I. Higa and Wilfred Chow testified for Respondent.

The parties filed proposed findings of fact, proposed conclusions of law and memoranda. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact and Conclusions of Law

Respondent Wilfred Chow lives at 45-608 Paholei Street, Kaneohe, Hawaii 96744. Since 1981, he has been employed as a shift supervisor at the Military Airlift Command (MAC) Terminal at Hickam Air Force Base at Honolulu, Hawaii. (TR 97-98) That terminal services military flights to and from Honolulu. After passengers are issued tickets or boarding passes at the ticket counter, their baggage must be inspected by representatives of the Plant Protection and Quarantine programs (PPQ) of the U.S. Department of Agriculture. After he inspects, the PPQ inspector places a sticker on each piece of baggage and the baggage is moved to a staging area, which is also called the "baggage makeup area." (TR 23-24)

The Plant Protection and Quarantine Program is designed to prevent the entrance and interstate movement of plant pests and diseases in the United States. There are many plant pests throughout the world that are not present in the United States. The entry of such pests could be extremely damaging to agricultural crops. As an example, the Mediterranean fruit fly in 1983 caused extensive damage in California which resulted in costs of about one hundred million dollars to eradicate the infestation. (TR-8-9)

On August 16, 1986, outbound Flight number 6642*, with a capacity of 40 passengers, was scheduled to depart from Hickam Air Force Base for Oklahoma City at 7:10 p.m. (TR 70-98) Normally, at Hickam, MAC attempts to complete processing of a flight approximately two hours before its departure time. The passengers for Flight 6642 had been issued their tickets by 5:10 p.m. The Department of Agriculture Inspector, Steven Chow, testified that he began inspecting bags for this flight at 4:50 p.m., and at 6:15 p.m., he inspected the crew at planeside. Then he received a telephone call at 6:30

*Some witnesses referred to this flight as GO42.

p.m., asking him to inspect an incoming flight. He left to inspect the incoming flight. When Steven Chow returned to see if any other bags for the Oklahoma City flight needed inspection, he found 10 bags in the baggage makeup area marked with dull orange colored baggage stickers. At the time, he was using bright orange colored stickers. In addition, the stickers were placed on the sides of the baggage. It was his custom to wrap the stickers around the baggage handles. (TR 42-43) He concluded that someone other than he or another PPQ employee had put the stickers on the bags and he began questioning employees in the area.

Steven Chow testified that when he questioned Respondent, Respondent admitted that he had placed the dull orange colored stickers on the bags because he had trouble reaching Steven Chow. When Steven Chow asked Respondent where he obtained the stickers, according to Seven Chow, Respondent told him that he had found the stickers underneath the Agricultural inspection counter. (TR 45) When he asked Respondent, "Where's the rest of the stickers?", Respondent replied that he used them all.

Steven Chow asked Respondent for a statement (TR 45-46) and Respondent signed the following written statement:

> "To whom it may concerned [sic]. We paged for Agriculture and called Agriculture Inspector by radio and paging system with no response. [Flight] 6642 had departure of 1930 and time was 1850. Two passengers waited for Agriculture for thirty-five minutes before Agriculture showed up. I checked each PAX bags on counter for agricultural products and none of the bags contained fruits of any kind. Agriculture Inspector showed up at @ 1850 and identified baggage and cart not checked and uncovered PAX bags supposed checked by me. Agriculture Inspector indicated to me I was in violation. Certified to be true and correct. Wilfred Chow, Swingshift Supervisor. (Complainant's Exhibit (CX) C)

Steven Chow also testified that he questioned one of the passengers, a Ms. Kilianek, and asked her what happened. She told him, "The gentleman asked me if I had any food and I repled negatively and I was passed for inspection." (TR 49) Steven Chow testified that he knew that he had not inspected the bags because of the color of the stickers, the location of the stickers, and also because one of the bags was a large box which he specifically recalled not inspecting. (TR 62-64)

Respondent testified that he was concerned about the difficulty in reaching Steven Chow shortly before the Oklahoma City flight. After repeated phone calls, Steven Chow arrived in the area of the outgoing flight at 6:35 p.m. Respondent denied putting agricultural inspection tags on the bags and denied having access to the tags. (TR 104) Respondent explained that when he stated in his statement that he checked the bags for agricultural products, he meant that he asked people whether they had any fruit in those bags. (TR 127)

I find that Respondent Wilfred Chow placed agricultural inspection stickers on the 10 bags in question. This finding is based upon my assessment of the demeanor and credibility of the witnesses as well as Respondent's written statement. I found Steven Chow to be a credible witness who has no reason to testify falsely. I found Respondent to be less believable. I do not accept Respondent's denial that he admitted the violation to Steven Chow, in the light of Steven Chow's more credible testimony and Respondent's written statement at the time of the incident in which he stated:

> "I checked each PAX bags on counter for agricultural products and none of the bags contained fruits of any kind."

7 C.F.R. § 318.13-10 states that all aircraft traveling from Hawaii to the continental United States shall be subject to inspection by Department of Agriculture inspectors and that at their discretion the inspection may be made immediately prior to the departure of the aircraft from Hawaii in lieu of inspection upon arrival. By placing Department of Agriculture inspection stickers on the 10 bags and having the bags moved to the baggage makeup area, Respondent thwarted the enforcement of this regulation and thereby violated the regulation. Once baggage is placed in the baggage makeup area, it is offered for shipment and is available to be loaded without further inspection. (TR 24, 50)

I find that the sanction requested by Complainant, the assessment of a civil penalty of $500.00 is appropriate. The Department of Agriculture spends millions of dollars annually to administer the Plant Protection and Quarantine Program. Respondent's conduct could have resulted in the costly spread of plant disease and insect infestation.

Order

Respondent Wilfred Chow is hereby assessed a civil penalty of $500.00 which shall be paid within 30 days after service of this Order upon Respondent. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the United States Department of Agriculture, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

The certified check or money order should also indicate the docket number (P.Q. Docket 317) of this matter.

This Order shall be final and effective 35 days after the date of service of this Decision and Order upon Respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the applicable Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final April 18, 1989.-Editor]

In re: SWEETWATER LANDSCAPE AND NURSERY, INC.
P.Q. Docket No. 88-20.
Dismissal Without Prejudice filed April 13, 1989.

Sheila Novak, for Complainant.
Respondent, Pro se.
Dismissal Without Prejudice issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon the motion of complainant and for good cause shown, the complaint in the above-entitled proceeding is hereby dismissed without prejudice.

In re: MSGT CHARLES A. HICKS.
P.Q. Docket No. 88-19.
Dismissal Without Prejudice filed April 20, 1989.

Sheila Novak, for Complainant.
Respondent, Pro se.
Dismissal Without Prejudice issued by Victor W. Palmer, Chief, Administrative Law Judge.

For good cause shown and on complainant's motion, this proceeding is dismissed without prejudice.

In re: LUIS REYES.
P.Q. Docket No. 89-12.
Dismissal Without Prejudice filed May 4, 1989.

Jeffrey Bloxsome, for Complainant.
Respondent, Pro se.
Dismissal Without Prejudice issued by Victor W. Palmer, Chief, Administrative Law Judge.

For good cause shown and on complainant's motion, this proceeding is dismissed without prejudice.

In re: L & M PRODUCE.
P.Q. Docket No. 89-14.
Dismissal filed May 10, 1989.

Christine O'Leary, for Complainant.
Respondent, Pro se.
Dismissal issued by Victor W. Palmer, Chief, Administrative Law Judge.

For good cause shown and on complainant's motion, this proceeding is dismissed.

In re: MARRIOTT IN FLIGHT SERVICES.
P.Q. Docket No. 89-26.
Motion to Dismiss filed June 22, 1989.

Sheila Novak, for Complainant.
Respondent, Pro se.
Motion to Dismiss issued by Victor W. Palmer, Chief, Administrative Law Judge.

Upon complainant's motion, the complaint filed herein shall be dismissed.

VETERINARY ACCREDITATION

In re: DR. RONALD LINDBERG, INC.
V.A. Docket No. 89-1.
Dismissal Without Prejudice filed April 26, 1989.

Andrew Baker, for Complainant.
R. T. Maltby, for Respondent.
Dismissal Without Prejudice issued by Victor W. Palmer, Chief, Administrative Law Judge.

For good cause shown and on complainant's motion, this proceeding is dismissed without prejudice.

In re: DR. GERALD L. MYERS, D.V.M.
V.A. Docket No. 88-4.
Decision and Order filed June 12, 1989.

Suspension of veterinarian accreditation - Failure to complete certificates.

Respondent's accreditation as a veterinarian suspended for two years because he violated the Standards for Accredited Veterinarians. Respondent permitted cattle to be moved interstate without individually identifying each cow and without showing the result of the brucellosis test on the health certificate.

Christine O'Leary, for Complainant.
Gerard D. Eftink, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding instituted by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("USDA"), under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*). The Administrator ("complainant") seeks to suspend respondent's accreditation as a veterinarian because of alleged violations of the Standards for Accredited Veterinarians (9 C.F.R. § 161.3) (also referred to as "Standards").

A hearing was held in Kansas City, Missouri, on March 7, 1989. Complainant was represented by Christine M. O'Leary, Esq. Respondent was represented by Gerard D. Eftink, Esq. Both parties filed post-hearing briefs, which have been considered together with the record in this matter.

Facts

Respondent, a licensed doctor of veterinary medicine, has been an accredited veterinarian under the State-Federal cooperative disease control program since 1975. Also since 1975, respondent has been the market

veterinarian for the MFA Livestock Market in Grant City, Missouri. It is now called the Grant City Livestock Exchange but for purposes of this decision it will be referred to as the "Market."

Respondent has a small room as his work station at the Market, but his principal office is in Pickering, Missouri, which is approximately 30 miles from the Market. Respondent estimates that approximately 60% of his work (about $3,000 a month) depends on his accreditation.

As the Market's veterinarian, respondent checks, inspects, tests, vaccinates and prepares government health forms for the animals brought to the Market for sale. He usually starts inspecting and testing the cattle, including blood tests for the disease Brucellosis, the day before sale day. Cattle sales at the Market range from 200 to 3,000 in a week. Test-eligible cattle are unvaccinated cows 18 months or older and vaccinated cows two years old, or older. Respondent also vaccinates unvaccinated heifers. After being tested, or vaccinated, the animals are given ear and back tags. Each animal has individual identification.

Respondent maintains a worksheet as he works listing each animal being tested and inspected. The information from this worksheet is later transferred at his office by respondent or his assistants to official government forms. These forms together with test blood samples are forwarded to a state laboratory for confirmation of the test results.

When cattle are sold, respondent is supposed to prepare a Missouri "Official Health Certificate" showing each animal's identification, sex, age, breed, and, if test-eligible, the results of the Brucellosis test. One copy of the certificate accompanies the shipment of animals; the other copy is sent to the state. When cattle are being sold to a buyer in another state, respondent calls the appropriate official in the receiving state, tells him/her the test results, and requests a "permit for entry" into the state for the animals.

On November 9, 1985, a Saturday, respondent began testing cattle at the Market for a sale to start on the following Monday, November 11. He completed the testing about midnight on Monday. All cattle at the Market for sale tested negative for Brucellosis. On Tuesday, when respondent returned to the Market to vaccinate some calves, the Market's manager told respondent that 34 test-eligible cows (over twenty-four months) and 17 heifers had been sold and were to be shipped by truck to a buyer in Beaver Crossing, Nebraska. Respondent's worksheets containing the information he needed to complete the Official Health Certificate on the cattle being sold had been left at his Pickering office for his assistants to complete the forms that were to accompany the test blood samples to be sent to the state laboratory. Instead of driving back to his office to obtain the information he needed, respondent merely wrote on the required health certificate "10 hd. cows, 17 hd. cows, 25 hd. cows, and 18 yr. hfr." Test results were not shown. (Complainant's exhibit 1). One copy of the certificate (number 447326) accompanied the animals. The other copy was sent to the state. Respondent then called Nebraska for a permit for entry for the cattle.

Respondent's explanation for his action in preparing an admittedly abbreviated health certificate was that he worked daylight to dark and that he would have had to take time out from his work to drive the 30 miles to Pickering and back to get the required information. He said he took the action he did "so the trucks could get on the road." He admitted that in this instance he "tried to skim by," but that, since all of the cattle had tested negative for Brucellosis ("no reactors"), he thought his action was "legal except technically the paper's incorrect." He also expected the state to return the certificate because it was not prepared properly, apparently assuming that he could then prepare and file a properly prepared certificate. The state did stamp the certificate as not approved, but did not return it to respondent.

On November 13, respondent sent a second certificate to the Nebraska cattle buyer with individual identification of 17 of the cattle that had been bred so that the buyer "would know what he bought." Respondent did not file a copy with the state because, he testified, he "didn't want to confuse the issue, there was already a mistake made, but it would have been better to fill them out properly and make a notation to replace his earlier [certificate]."

Approximately 14 months later, in January 1987, the Market was scheduled for a "livestock market approval" inspection by State and Federal officials. Reapproval is required to permit a livestock market to continue a ship cattle to, or receive cattle from, other states. On January 14, 1987, the Market was inspected by James Neal, a USDA investigator, Dr. Debbie Burton, a USDA veterinarian, and Dr. Gerald McKee, a state veterinarian. The investigators, who had notified the Market in advance and had made an appointment for the inspection, met with the Market's manager, Edward Amdor. In the course of the inspection, the investigators asked to see the Market's records. According to Neal, Amdor opened a filing drawer in respondent's room at the Market and said "here are the records." According to Amdor, he didn't know what records were kept but assumed that whatever records were kept were kept by respondent and that he kept them in a filing cabinet. He testified that the investigators went into respondent's room and looked in the filing cabinet "on their own."

In any event, the cabinet was unlocked and the investigators found seven health certificates, with copies, that were not filled out (i.e., no animals listed on the certificates) except for the Market's name, respondent's signature and the date "1-9-87." Respondent arrived soon after these certificates were found and was asked by Neal if he had presigned the certificates so that "others" could ship cattle. Respondent replied that only he and his assistants had access to the certificates and that he had partially filled out and signed the certificates on January 9 to expedite the movement of cattle that had been sold that day. Deborah Thummel, one of respondent's assistants, testified that the certificates were pre-signed only after the cattle had been tested and the sale was in progress. Respondent also stated that as the cattle are sold the buyers line up outside his room to obtain the certificates so they could load the animals on their trucks. It was respondent's practice at the time to try to

expedite the process by filling out the forms with the Market's name and his signature during a break and then, when a buyer came in, to complete the certificate with the specific information on the cattle the buyer bought. On January 9, however, he pre-signed more certificates than were needed. He claims that after this incident, he stopped putting pre-signed certificates in the file.

Further evidence was received to the effect that respondent, apart from the two incidents in 1985 and 1987, has enjoyed a good reputation for integrity and honesty as an accredited veterinarian, including a statement to that effect from Dr. Gerald McKee, a veterinarian for the Missouri Department of Agriculture, who was one of the inspectors on January 14, and who has supervised respondent's work at the Market since 1975 (respondent's exhibit 11).

Respondent was also an active participant in the Brucellosis testing program when it was a voluntary program in 1975 and recommended the program to producers so as to upgrade Missouri's rating in the control of Brucellosis from a Class B to Class A state. He has had assistants certified by the state of Missouri and USDA to conduct Brucellosis testing (RX-10; TR 172).

As for Brucellosis, Dr. Warren Ward, USDA's veterinarian in charge for Missouri, testified that it is an infectious bacterial disease that affects a cow's reproductive tract and that both Federal and State governments have spent substantial sums to control and eradicate the disease.[1] He pointed out the importance of health certificates in identifying the movement of cattle in the control of the disease and said that accredited veterinarians play an essential role in maintaining the integrity of the Brucellosis control program. He said that he considers any violation of the Standards for Accredited Veterinarians to be serious.

Respondent did not deny knowledge of the Standards and the record shows that he knew of their requirements (see e.g., complainant's exhibit 21).

Discussion

The complaint alleges that respondent violated the Standards for accredited Veterinarians (9 C.F.R. § 161.3) on November 12, 1985, when he allowed approximately 34 cattle to move interstate (from Missouri to Nebraska) without a health certificate showing the individual identification of each animal and the results of the Brucellosis tests on these cows. The complaint further alleges that respondent violated the standards on January 9, 1987, by signing health certificates before they were properly completed and also allowing pre-signed certificates to leave his custody. The complainant,

[1]See 9 C.F.R. § 78 *et seq.* for full description of the program.

alleging that the violations were willful, seeks a six-month suspension of respondent's accreditation.

Respondent denies that violations were committed, contending that the cattle had been properly inspected and tested, that they tested negative and that the health certificates were always kept under respondent's control and custody. Respondent further contends that accreditation is a license within the meaning of the Administrative Procedure act (5 U.S.C. § 551(8)) and that it therefore can be suspended, except in the case of willfulness, only after the licensee (respondent) has been given written notice of his noncompliance and given an opportunity to comply (5 U.S.C. § 558(c)). Respondent argues that his conduct was not willful and that no notice had been given to him.

The relevant provisions of the Standards for Accredited Veterinarians are as follows:

9 C.F.R. § 78.1 defines a "certificate" as being an official document issued by, among other persons, an accredited veterinarian "at the point of origin of a movement of animals" which certificate must show the individual identification "of each animal to be moved."

9 C.F.R. § 161.3(b) provides that an "accredited veterinarian shall not sign any certificate, form, record, or report, or permit such as a certificate, form, record, or report to be used until and unless, he has ascertained that it has been accurately and fully completed clearly identifying the animal(s) . . .to which it applies and showing the results of the inspection, test, or vaccination, etc., he has conducted. . . ."

9 C.F.R. § 161.3(j) provides that "an accredited veterinarian shall be responsible for proper use of all certificates, forms, records, reports, tags, brands, bands, or other identification used in his work as an accredited veterinarian and shall take proper precaution to prevent misuse thereof. . .he shall not permit any certificate, form, record, report, tag, brand, or other identification, to be kept in the custody of anyone but himself prior to official use."

9 C.F.R. § 161.4(a) provides that the Secretary may suspend the accreditation of a veterinarian when he determines that the veterinarian has not complied with "Standards for Accredited Veterinarians."

The evidence, which is uncontroverted, clearly shows that respondent violated the foregoing Standards. The Missouri Official Health Certificate that respondent signed on November 12, 1985, to allow the movement of 34 test-eligible cattle from Missouri to Nebraska was a "certificate" within the meaning of 9 C.F.R. § 78.1 which requires accredited veterinarians to individually identify each animal "to be moved." Respondent, therefore, as an accredited veterinarian, not only had to identify each animal separately on the certificate before the animals could be moved, he also had to show the test result for each of the animals as required by 9 C.F.R. § 161.3(b). By signing the certification November 12 without identifying and showing the test result for each animal, respondent violated the Standards. Respondent's attempt to

prepare a follow-up certificate a day or two later did not remedy the violation because it was prepared after the cattle were moved and it wa further deficient because it did not cover all the cattle involved.

Respondent likewise violated the Standards on January 9, 1987. 9 C.F.R. § 161.3(b) states explicitly that an accredited veterinarian "shall not sign any certificate" until it has been "accurately and fully completed." The record shows without contradiction that respondent signed official health certificates on January 9, 1987, before they were fully completed with information identifying the animals to which the certificates were to be applied.

However, it is not shown by a preponderance of the evidence that respondent had allowed the signed certificates out of his custody. The certificates were kept in a room reserved for his use at the Market where he spent substantial time each week performing his duties. Although the Market's manager apparently had access to the room, he indicated that the room was reserved for respondent's official use and there is no showing that the manager, or anyone else for that matter, ever had control over, or possession of, the certificates. The room was in effect respondent's office and the records he kept there in a filing cabinet were therefore in his custody. They remained in his custody until taken by State and Federal officials in the course of their inspection on January 14, 1987.

Nevertheless, it is also noted that, although in the circumstances here, there was no actual misuse by others of the certificates and the risk was not great that an unauthorized person might gain access to the certificates and use them improperly (e.g., to transport disease suspect cattle), a risk, even though slight, of potential misuse was created when the certificates were pre-signed. Pre-signing is thus a violation of an accredited veterinarian's duty under 9 C.F.R. § 161.3(j) to prevent the misuse of the certificates.

The remaining issue is the penalty to be imposed for these violations. Complainant, contending that the violations were willful, seeks a six-month suspension of respondent's accreditation. Respondent, while contending that his accreditation is a license and that it cannot be suspended without written notice, concedes that the Judicial Officer does not recognize an accreditation as a license. He requests that I ask the Judicial Officer to reconsider his position (respondent's brief, p. 14). A request of this nature is one for an advocate to make. As an administrative law judge, I am constrained to follow precedent and on this point the law as promulgated by the Judicial Officer is that an accreditation is a privilege, not a license. *Dr. John S. Ruster*, 41 Agric. Dec. 845 (1982). Therefore, an accredited veterinarian, such as respondent, is not necessarily entitled to notice and an opportunity to comply prior to suspension of his accreditation. Moreover, penalties are not only assessed to punish the violator, they are also assessed to deter others. *Indian Slaughtering Co.*, 35 Agric. Dec. 1822 (1976). A penalty in the form of a suspension is thus appropriate under 9 C.F.R. § 161.4(a).

Still, the Judicial Officer has indicated that in determining the extent of a penalty for a violation of the Standards, a "standard of reasonableness" should

be met. *Dr. John H. Collins*, ___ Agric. Dec. ___, [illegible]
27, March 1987). In *Collins*, the Judicial Officer indicated on page 3 that the appropriate penalty for a veterinarian who signs and issues certificates that are not in compliance with Federal and State regulations and instructions (as respondent has done in the instant case) would be a 60-day suspension of his accreditation. However, in that case, the veterinarian involved had also engaged in other far more serious violations (sending improperly drawn blood samples to the state laboratory for testing) and had displayed, according to the Judicial Officer, a "lax" and "cavalier" attitude toward the Brucellosis control and eradication program. In those circumstances, where the violations were far more serious than those here and there were no mitigating circumstances, the Judicial Officer determined that the appropriate penalty should be revocation of the veterinarian's accreditation.

In this case, respondent had presigned certificates on one occasion and on another had signed and issued a certificate that was not in accordance with government regulations. However, unlike *Collins*, respondent did not engage in more serious violations and certainly did not display a "lax" or "cavalier" attitude toward the Brucellosis control program. On the contrary, the record shows that respondent had taken the initiative in complying with and promoting the program when it was still voluntary so as to diminish the threat of the disease in Missouri. It is also noteworthy that in over ten years of work as an accredited veterinarian, the two incidents cited in the complaint are the only instances where respondent has strayed from the Standards and he has been commended by, among other persons, his supervising state veterinarian for his integrity.

I also find that the violations were not willful. "An action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirement." *Shatkin*, 34 Agric. Dec. 296 (1975). The Supreme Court, in *United States v. Murdock*, 290 U.S. 389 (1933), stated that in arriving at the meaning of the word "willfully" one must look at the context in which it is used. (*Accord, Screws v. United States*, 325 U.S. 91 (1945)). The Fifth Circuit, citing *Murdock*, held that "the word willful means no more than that the forbidden act is done deliberately and with knowledge." *McBride v. United States*, 225 F.2d 149 (1955); *cert. denied*, 350 U.S. 934 (1956).

In the circumstances here the violations occurred in the context of pressures from work rather than from any deliberate intent to evade the Standards. While this does not excuse respondent's violations, it does show that his acts were not committed with a careless disregard for the law. Although respondent's health certificate did not show the test result for each animal, respondent had in fact properly inspected and tested each animal before hand with the results being negative for Brucellosis. Respondent's action in this instance, though serious -- as any violation of the Standards is indeed serious -- was not in these circumstances so serious as to actually jeopardize the Brucellosis control program or cause a spread of the disease.

Respondent's pre-signing of the certificates likewise did not constitute, in the circumstances, a significant risk to the program as they remained within his custody. Respondent, moreover, stated his intention following the discovery of the violations to promptly correct them.

The violations, therefore, did not demonstrate that respondent deliberately intended to evade the Standards or had a careless disregard for the law or regulations. Respondent's conduct was thus not willful.

Considering respondent's two violations in light of his over ten years of otherwise good compliance with the Standards, I find that in applying a standard of reasonableness in the circumstances here, a two-month suspension of respondent's accreditation (one month for each violation) is an appropriate penalty.[2]

Findings of Fact

1. Dr. Gerald L. Myers, respondent, is an individual whose mailing address is R.R. 1, Pickering, Missouri 64476.

2. Respondent is now, and at all times herein was, a Doctor of Veterinary Medicine and an accredited veterinarian in the State of Missouri under the provisions of Title 9, Code of Federal Regulations, Parts 160-62 (9 C.F.R. § 160-62).

3. On or about November 12, 1985, respondent permitted approximately thirty-four (34) cattle, over twenty-four months of age, to move interstate from Grant City, Missouri to Beaver Crossing, Nebraska, on Missouri Official Health Certificate 447326, without individually identifying each cow and without showing the result of the Brucellosis testing respondent conducted on the animals, as required.

4. On or about January 9, 1987, respondent signed Missouri Official Health Certificates before the certificates were fully and accurately completed, or required.

Conclusion

By reason of the foregoing Findings of Fact, respondent has violated the Standards for Accredited Veterinarians. The following Order is accordingly issued.

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[2]The economic loss to respondent because of the suspension is equivalent to a $6,000 fine. Respondent argues that, in determining the penalty to impose, I should be guided, by analogy, by the Cattle Contagious Disease Act which imposed a $1,000 fine for each violation (21 U.S.C. § 134(c)). While consideration has been given to that argument, I find that the penalty, such as the one I find is appropriate in this case, should be greater for an accredited veterinarian who violates his pledge to comply with the Standards. I am, of course, also guided by the *Collins* decision, *supra*, wherein the Judicial Officer indicated that a two month suspension is appropriate in a case of this nature.

Order

Respondent's accreditation, under 9 C.F.R. § 160-162 is hereby suspended for two months from the effective date of this Order. This Order shall become final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final July 27, 1989.-Editor]

DEFAULT DECISIONS

ANIMAL QUARANTINE AND RELATED LAWS

In re: ERNEST MENDEL, d/b/a REDFIELD FARMS, INC., HUGH MCGOVERN, d/b/a MCGOVERN FARMS, INC.; PHILLIP ZIMMERMAN, d/b/a C. P. ZIMMERMAN & SONS, INC.; AND DONALD HARTWELL, d/b/a DON HARTWELL TRUCKING.
A.Q. Docket No. 88-14.
Decision and Order as to Donald Hartwell filed November 28, 1988.

Admission of allegations of complaint - Interstate movement of cattle without required certificate.

Christine O'Leary, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle (9 C.F.R. Part 78), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.*, and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on June 21, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about September 9, 1987, respondent Donald Hartwell, d/b/a Don Hartwell Trucking, moved at least twenty (20) cattle interstate from Milford, New Hampshire to Amelia, Virginia, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

On July 1, 1988, the respondent filed a letter admitting he moved cattle from Milford, New Hampshire to Amelia, Virginia; however, he failed to deny or respond as to whether he moved the animals with the required certificate. Pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), the failure to deny or otherwise respond to an allegation of the complaint constitutes, for the purposes of this proceeding, an admission of said allegation. Therefore, respondent is deemed to have admitted all of the allegations of the complaint, and, thus, has waived his right to a hearing in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.1.39).

Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Donald Hartwell, d/b/a Don Hartwell Trucking, is an individual whose mailing address is P.O. Box 491, Winchester, New Hampshire 03470.

2. On or about September 9, 1987, respondent moved at least twenty (20) cattle interstate from Milford, New Hampshire to Amelia, Virginia, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)).

Therefore, the following Order is issued.

Order

The respondent, Donald Hartwell, d/b/a Don Hartwell Trucking, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be sent to the United States Department of Agriculture, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-14.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 25, 1989.-Editor]

In re: STEVE CONLEY, LARRY CONLEY, AND J. O. SHAW, d/b/a C & S CATTLE CO.
A.Q. Docket No. 88-24.
Decision and Order filed February 23, 1989.

Failure to file a timely answer - Interstate movement of cattle without required certificate, permit for entry, and two consecutive negative tests for brucellosis.

Sheila H. Novak, for Complainant.
Edgar J. Garrett, Jr., for Respondents.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the interstate movement of cattle (9 C.F.R. Part 78), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on August 12, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not subjected to two consecutive official negative tests for brucellosis, as required. The complaint also alleged that on or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)) because the cattle were not accompanied by a certificate, as required. The complaint further alleged that on or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a Permit for Entry, as required. Additionally, on or about October 5, 1985, the respondents moved interstate approximately twenty-six (26) cattle, which were official vaccinates over 24 months of age, from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iv) of the regulations (9 C.F.R. § 78.9 (d)(3)(iv)), because the cattle were not accompanied by a certificate, as required. Finally, the complaint alleged that on or about October 5, 1985, the respondents moved interstate approximately twenty-six (26) cattle, which were official vaccinates over 24 months of age, from Siloam Springs, Arkansas to Cooper, Texas, in violation of section 78.9 (d)(3)(iv) of the regulations (9 C.F.R. § (d)(3)(iv)) because the cattle were not accompanied by a Permit for Entry, as required.

Respondents failed to file a response to the complaint within the time prescribed by section 1.136 (a) of the Rules of Practice (7 C.F.R. § 1.136 (a).

The complaint was served on respondents August 22, 1988. By communication dated September 23, 1988, and received in the Hearing Clerk's office on September 27, 1988, the respondents filed an answer consisting of general denials and requesting an oral hearing. By reason of its untimely answer and in accordance with section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136 (c)), such failure to timely deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of that allegation.

In view of the aforementioned facts, the respondents are deemed to have admitted the material allegations of the complaint, and, therefore, respondents have waived their right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice (9 C.F.R. §§ 1.136 and 1.139).

Findings of Fact

1. Steve Conley, Larry Conley, and J. O. Shaw, d/b/a C & S Cattle Company, respondents, are individuals doing business at Route 1, Cooper, Texas 75432.

2. On or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R § 78.9 (d)(3)(iii)), because the cattle were not subjected to two consecutive official negative tests for brucellosis, as required.

3. On or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)) because the cattle were not accompanied by a certificate, as required.

4. On or about October 5, 1985, the respondents moved interstate approximately twenty-five (25) cattle from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a Permit for Entry, as required.

5. On or about October 5, 1985, the respondents moved interstate approximately twenty-six (26) cattle, which were official vaccinates over 24 months of age, from Siloam Springs, Arkansas, a Class C state, to Cooper, Texas, in violation of section 78.9 (d)(3)(iv) of the regulations (9 C.F.R. § 78.9 (d)(3)(iv)), because the cattle were not accompanied by a certificate, as required.

6. On or about October 5, 1985, the respondents moved interstate approximately twenty-six (26) cattle, which were official vaccinates over 24 months of age, from Siloam Springs, Arkansas to Cooper, Texas, in violation

of section 78.9 (d)(3)(iv) of the regulations (9 C.F.R. § (d)(3)(iv)) because the cattle were not accompanied by a Permit for Entry, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondents have violated sections 78.9 (d)(3)(iii) and 78.9 (d)(3)(iv) of the regulations (9 C.F.R. §§ 78.9 (d)(3)(iii) and 78.9 (d)(3)(iv)). Therefore, the following Order is issued.

Order

The respondents, Steve Conley, Larry Conley, and J. O. Shaw, d/b/a C & S Cattle Company, are hereby assessed a civil penalty of two thousand five hundred dollars ($2,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be sent to "USDA, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this Order. Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-24.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 28, 1989.-Editor]

In re: ERNEST MENDEL, d/b/a REDFIELD FARMS, INC., HUGH MCGOVERN, d/h/a MCGOVERN FARMS, INC.; PHILLIP ZIMMERMAN, d/h/a C. P. ZIMMERMAN & SONS, INC.; AND DONALD HARTWELL, d/b/a DON HARTWELL TRUCKING.
A.Q. Docket No. 88-14.
Decision and Order as to Phillip Zimmerman filed March 20, 1989.

Admission of material allegations - Interstate movement of cattle without certificate.

Christine O'Leary, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle (9 C.F.R. Part 78), hereinafter referred to as the regulations, in accordance

with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on June 21, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about September 9, 1987, Phillip Zimmerman, d/b/a C. P. Zimmerman & Sons, Inc., hereinafter referred to as the respondent, moved at least twenty (20) cattle interstate from Milford, New Hampshire to Amelia, Virginia, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

On July 18, 1988, the respondent filed a letter wherein he responded to and admitted the allegations of the complaint. In accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), this admission of the allegations in the complaint constitutes a waiver of hearing. Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Phillip Zimmerman, d/b/a C. P. Zimmerman & Sons, Inc., is an individual whose mailing address is Frizzell Hill Road, Leyden, Massachusetts 01337.

2. On or about September 9, 1987, respondent moved at least twenty (20) cattle interstate from Milford, New Hampshire to Amelia, Virginia, in violation of section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9 (d)(3)(iii) of the regulations (9 C.F.R. § 78.9 (d)(3)(iii)).

Therefore, the following Order is issued.

Order

The respondent Phillip Zimmerman, d/b/a C. P. Zimmerman & Sons, Inc., is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be sent to "USDA, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403", within thirty (30) days from the

effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-14.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 21, 1989.-Editor]

ANIMAL WELFARE ACT

In re: BRIAN WATSON, d/b/a East Coast Camel Co.
AWA Docket No. 416.
Decision and Order filed September 16, 1988.

Failure to file an answer - Exhibition of animals with a suspended license.

Robert Ertman, for Complainant.
Ralph Pino, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2156 (1982)), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent knowingly and willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1-3.142 (1985)).

Respondent's failure to file an answer within the time specified in the complaint constitutes an admission of all the material facts alleged in the complaint and a waiver of hearing (7 C.F.R. §§ 1.136(a), 1.139). Therefore, this Decision and Order is entered according to the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The respondent, Brian Watson, d/b/a East Coast Camel Co., is an individual whose address is Pond Street, Essex, Massachusetts 01929.

2. At all times material herein, respondent was operating as an exhibitor within the meaning of the Act.

3. On August 15, 1986, a copy of the complaint in this action was affixed to the front door of respondent's residence and place of business by a Compliance Officer employed by the Animal and Plant Health Inspection Service. On August 15, 1986, a copy of the complaint was mailed to respondent by the Hearing Clerk by first class mail, postage prepaid. These actions constitute service upon respondent pursuant to section 1.147(b)(2) of the Rules of Practice (7 C.F.R. § 1.147(b)(2)). Further, on August 18, 1986, the Compliance Officer mailed another copy of the complaint to respondent, although service of this copy was not required by the Rules of Practice.

4. Respondent personally received all three copies of the complaint. Respondent falsely represented that he had not been served with the complaint by writing "moved address unknown" on the envelope of each and causing them to be returned.

5. On February 13, 1986, a Consent Decision and Order was issued in AWA Docket No. 362. The Order, which became effective on that date, suspended respondent's license for a period of 60 days and thereafter until he

demonstrates that he is in full compliance with the Act and the regulations and standards issued thereunder. The suspension remains in effect. Respondent knowingly and willfully violated the Order and sections 3 and 4 of the Act (7 U.S.C. §§ 2133, 2134) by transporting and exhibiting animals on the occasions specified below.

A. On or about May 31, 1986, respondent exhibited an elephant at an automobile dealership in Lynn, Massachusetts.

B. On or about June 20, 1986, respondent exhibited an elephant, lion, tiger, and three monkeys at an automobile dealership in Lynn, Massachusetts.

C. On or about July 4, 1986, respondent exhibited an elephant, monkeys and other animals at a school in Peabody, Massachusetts.

D. On or about July 4, 1986, respondent exhibited an elephant, camel and leopard at a parade in Wakefield, Massachusetts.

E. On or about July 21, 1986, respondent exhibited an elephant, camel, and other animals at Marine Park in South Boston, Massachusetts, as part of South Boston Pride Day.

6. On August 5, 1986, respondent's facilities in Essex, Massachusetts, were inspected and respondent was in violation of the February 13, 1986, Consent Decision and Order, and section 2.100 of the regulations and the standards specified below.

A. The elephant enclosure was not constructed and maintained so as to provide sufficient space to allow the elephant to make normal postural and social adjustments with adequate freedom of movement. The elephant was chained so as to allow only slight movement from side to side, and almost no movement forward or backward. (9 C.F.R. § 3.128)

B. The elephant enclosure was not structurally sound and in good repair. The rear wall was in danger of collapsing, and respondent had placed a board with protruding spikes which would scrape or puncture the elephant if it moved against the wall. (9 C.F.R. § 3.125(a))

C. The elephant enclosure did not have a suitable method to eliminate excess water. There was an accumulation of wet, moldy bedding in the enclosure, and water beneath the floor mats. (9 C.F.R. § 3.126(d))

D. A primate (spider monkey) was confined in a shipping crate which did not provide adequate space for the animal to stand or make other normal postural adjustments. (9 C.F.R. § 3.78(b))

E. The primate enclosures were not kept clean and sanitized as required. The shipping crate referred to in paragraph D was caked with fecal material, urine, food, and shavings. Other primary enclosures had a buildup of fecal material and other debris. (9 C.F.R. § 3.81(a) and (b))

F. The primate enclosure was not structurally sound and in good repair so as to protect the primates from injury. Sharp broken and cut wires protruded into the enclosure. (9 C.F.R. §§ 3.75(a), 3.78(a))

G. Water receptacles for the primates were contaminated with waste and in need of cleaning and sanitation. (9 C.F.R. § 3.80)

H. Water receptacles for tigers were contaminated and in need of cleaning and sanitation. (9 C.F.R. § 3.130)

I. Two mountain lions were seriously malnourished. (9 C.F.R. § 3.129(a))

J. Food Supplies were not stored with adequate protection against deterioration, molding, or contamination by vermin. A freezer and refrigerator were not working, and contained spoiled and rotting meat. Open bags of grain were stored in a room with paint, lime, oils, and other dangerous materials. Open and unopen bags of grain were stored near fecal material and other debris. An open storage room and an open area were filled with moldy bread. (9 C.F.R. §§ 3.75(c) 3.125(c))

K. The premises (buildings and grounds) were not kept clean and free of weeds, trash, and debris; rodents were uncontrolled. (9 C.F.R. §§ 3.81(c) and (d), 3.131(c) and (d))

Conclusion

Respondent violated the Act, the regulations, and the Order issued in AWA Docket No. 362 by exhibiting animals while his license was suspended. Further, respondent kept his animals in deplorable conditions, indicating intentional cruelty. Finally, respondent attempted to frustrate the enforcement of the Act by falsely representing that the complaint had not been served upon him. Such conduct cannot and will not be tolerated. The violations set forth herein warrant the sanction authorized under the Act (7 U.S.C. § 2149(a) and (b)) and contained in the following Order.

Order

1. Respondent, his agents and employees, directly or indirectly through any corporate or other device, in connection with his business as an exhibitor within the meaning of the Act, shall cease and desist from violating the Act and the regulations and standards under the Act, and in particular shall not act as an exhibitor within the meaning of the Act without having a valid and unsuspended license to do so.

2. Respondent's license as an exhibitor under the Act is revoked.

3. Respondent is assessed a civil penalty of $16,000 which shall be paid by certified check or money order payable to the Treasurer of the United States and forwarded to Robert A. Ertman, Room 2014-South Building, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, within thirty days from the date this Order become effective.

Copies of this Decision and Order shall be served upon the parties. The Order shall become effective 35 days after service upon the respondent, unless an appeal is filed pursuant to the Rules of Practice (7 C.F.R. § 1.145).

In re: BRIAN WATSON, d/b/a East Coast Camel Co.
AWA Docket No. 416.
Withdrawal of Appeal filed February 27, 1989.

Withdrawal of Appeal issued by Donald A. Campbell, Judicial Officer.

Upon motion of respondent, concurred in by complainant, respondent's notice of appeal is hereby withdrawn. The order previously filed in this proceeding shall become effective upon service of this order on respondent.

PLANT QUARANTINE ACT

In re: HINES WHOLESALE NURSERY.
P.Q. Docket No. 88-10.
Decision and Order filed October 17, 1988.

Failure to file an answer - Shipped plants without invoices impressed with USDA certification stamp - Shipped plants not treated for Imported Fire Ants.

Jaru Ruley, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin Bernstein, Administrative Law Judge.

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167) and regulations promulgated thereunder (7 C.F.R. §§ 301.81 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complainant alleged that respondent had violated the Act and sections 301.81-4(3) and 301.81-7 of the regulations (7 C.F.R. §§ 301.81-4(3) and 301.81-7 of the regulations (7 C.F.R. §§ 301.81-4(3) and 301.81-7).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on May 23 , 1988, by certified mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 C.F.R. § 1.147 (b)(3)).

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of allegations in the complaint and a waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for an answer would constitute a waiver of an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. 1.136(c)) and a waiver of hearing pursuant to section 1.1.39 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Hines Wholesale Nursery, herein referred to as respondent, is a business with a mailing address of P.O. Box 42815, Houston, Texas 77042.

2. On or about October 8, 1986, the respondent shipped over two thousand containers of plants from Fort Bend County, Texas, an Imported Fire Ant quarantined area, to Memphis, Tennessee, a nonregulated area, in violation of section 301.81-7 of the regulations (7 C.F.R. § 301.81-7) in that the invoices accompanying the containers of plants were not impressed with the USDA certification stamp, as required.

3. On or about June 2, 1987, the respondent shipped close to four thousand containers of plants from Fort Bend County, Texas, an Imported fire Ant quarantined area, to the states of North Carolina and Tennessee in violation of section 301.81-4(3) of the regulations (7 C.F.R. § 301.81-4(3)) in that the plants had not been treated for Imported Fire Ants, as required.

Conclusion

Respondent has failed to respond in the required manner to the allegations in the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Respondent Hines wholesale Nursery is hereby assessed a civil penalty of one thousand seven hundred fifty dollars ($1,750.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 88-10.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 27, 1989.-Editor]

In re: SERVAIR ALASKA, INC.
P.Q. Docket No. 88-23.
Decision and Order filed March 8, 1989.

Failure to file an answer to amended complaint - Improper disposal of foreign origin garbage.

Sheila Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the disposition of foreign origin garbage (7 C.F.R. § 330.400 (b)(1) and 9 C.F.R. § 94.5 (b)(1)), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a complaint filed on August 22,1988 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. An amended complaint was filed on September 19, 1988. This complaint alleged that on or about May 29, 1987 and June 16, 1987, the respondent disposed of foreign origin garbage in violation of sections 330.400 (b)(1) and 94.5 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1) and 9 C.F.R. § 94.5 (b)(1)) because the foreign origin garbage was not incinerated, sterilized, or ground into an approved sewage system, as required.

On September 7, 1988, the respondent filed an Answer responding to and admitting the allegations contained in the complaint. Respondent failed to file an Answer to the amended complaint within the time provided by section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136(c)). In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136 (c)), the failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of that allegation. The admission of the allegations contained in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139).

In view of the aforementioned facts, respondent has admitted or is deemed to have admitted the material allegations of the complaint, and, therefore, respondent has waived its right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact.

Findings of Fact

1. Servair Alaska, Inc., respondent, is a corporation with a business address of P.O. Box 6408, Anchorage, Alaska 99502.

2. On or about May 29, 1987, at Anchorage, Alaska, the respondent disposed of foreign origin garbage in violation of sections 330.400 (b)(1) and 94.5 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1) and 9 C.F.R. § 94.5 (b)(1)) because the foreign origin garbage was not incinerated, sterilized or ground into an approved sewage system, as required.

3. On or about June 16, 1987, at Anchorage, Alaska, the respondent disposed of foreign origin garbage in violation of sections 330.400 (b)(1) and 94.5 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1) and 9 C.F.R. § 94.5 (b)(1)) because the foreign origin garbage was not incinerated, sterilized or ground into an approved sewage system, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 330.400 (b)(1) and 94.5 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1) and 9 C.F.R. § 94.5 (b)(1)).

Therefore, the following order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the United States Department of Agriculture, APHIS Field Servieing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403 within thirty (30) days from the effective date of this Order. The certified check or money order shall indicate that payment is in reference to P.Q. Docket No. 88-23.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final June 27, 1989.-Editor]

In re: SEALAND SERVICE, INC.
P.Q. Docket No. 88-34.
Decision and Order filed March 8, 1989.

Failure to file an answer - Importation of uninspected fruit - Importation of fruit without providing written notice of inspection to collector of customs.

Christine O'Leary, for Complainant.
Respondent, Pro se.
Default Decision and Order issued by Paul Kane, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on September 7, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about April 2, 1988, respondent imported approximately nineteen (19) bags of cocoanuts from Costa Rica in violation of section 319.56-6(a) of the regulations (7 C.F.R. § 319.56-6(a)), because the fruit was not inspected, as required. In addition, the complaint alleged that on or about April 2, 1988, respondent moved approximately nineteen (19) bags of cocoanuts imported from Costa Rica through the port of first arrival in violation of section 319.56-6(c) of the regulations (7 C.F.R. § 319.56-6(C)), because written notice indicating that the product had been inspected had not been given to the collector of customs by the United States Department of Agriculture as required.

The complaint was served upon Respondent by certified mail on September 28, 1988, in accordance with section 1.147 of the Rules of Practice (7 C.F.R. § 1.147). Respondent failed to file a response to the complaint within the time provided by section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent is deemed to have admitted the material allegations in the complaint, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the Findings of Fact.

Findings of Fact

1. Respondent, Sealand Service, Inc., is a company with a mailing address of P.O. Box 13041, Port Lauderdale, Florida 33316.

2. On or about April 2, 1988, respondent imported approximately nineteen (19) bags of cocoanuts from Costa Rica in violation of section 319.56-6(a) of the regulations (7 C.F.R. § 319.56-6(a)), because the fruit was not inspected, as required.

3. On or about April 2, 1988, respondent moved approximately nineteen (19) bags of cocoanuts imported from Costa Rica through the port of first

arrival in violation of section 319.56-6(c) of the regulations (7 C.F.R. § 319.56-6(c)), because written notice indicating that the product had been inspected had not been given to the collector of customs by the United States Department of Agriculture, as required.

Conclusion

By reason of the Findings of Fact set forth above, respondent has violated the Act and sections 319.56-6(a) and 319.56-6(c) of the regulations (7 C.F.R. §§ 319.56-6(a) and 319.56-6(c)). Therefore, the following order is issued.

Order

Respondent, Sealand Service, Inc., is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00) which shall be made payable to the "Treasurer of the United States" by a certified check or money order, and shall he forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final April 25, 1989.-Editor]

In re: TAELK FUNG.
P.Q. Docket No. 88-39.
Decision and Order filed March 8, 1989.

Admission of allegations in complaint - Failure to unload imported garbage in tight, leak-proof, covered receptacles to an approved facility for incineration, sterilization or grinding.

'omplainant.

r, Administrative Law Judge.

§ 150 aa *et seq.*) and section 94.5 of the regulations (9 C.F.R. § 94.5) issued under the Act of February 2, 1903 as amended 21 U.S.C. §§ 111 and 120. On October 6, 1988 the Hearing Clerk served respondent by certified mail with a copy of the complaint and with a copy of the Rules of Practice which govern proceedings under the Act.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny or otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and a waiver of hearing.

Respondent's answer filed within the time prescribed by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)) and waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth below as Findings of Fact.

Findings of Fact

1. Taelk Fung, herein referred to as respondent, is an individual whose address is K100169, Areo Mexico Airlines, JFK International Airport, International Arrivals, Jamaica, New York 11430.

2. On or about March 22, 1988, the respondent moved garbage consisting of bananas, from Areo Mexico Airlines flight #404 that arrived from Mexico City at John F. Kennedy International Airport, Jamaica, New York, in violation of section 330.400 (b)(1) of the regulations (7 C.F.R. § 330.400 (b)(1)) and section 94.5 (b)(1) of the regulations (9 C.F.R. § 94.5(b)(1)), because respondent failed to unload such garbage in tight, leak-proof covered receptacles, under the direction of an Animal and Plant Health Inspection Service Inspector to an approved facility for incineration, sterilization, or grinding, as required.

Conclusion

Respondent has admitted all the material allegations of the complaint. Since the respondent has filed a timely answer admitting the material allegations of the complaint and waiving his right to a hearing, the civil penalty requested in the complaint is reduced by one-half the original amount in accordance with the Judicial Officer's decisions in *In re: Shulamis Kaplinsky,* _____ Agric. Dec. _____, (March 31, 1988) and *In re: Richard Duran Lopez,* 44 Agric. Dec. 2201, 2210-2211 (1985). By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Taelk Fung is hereby assessed a civil penalty of Two Hundred Fifty Dollars ($250.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403.

The respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 88-39. This Order shall have the same force and effect as if entered after full hearing and shall be final and effective as to the respondent thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent shall appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 30, 1989.-Editor]

In re: NOBU OF HAWAII, INC.
P.Q. Docket No. 88-32.
Decision and Order filed March 17, 1989.

Admission of material allegations - Movement of prohibited article into continental U.S.

Patrice Harps, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) and the Act of August 20, 1912, as amended (7 U.S.C. §§ 161 and 162) (Acts) by a complaint issued by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated section 318.13-2(a) of the regulations (7 C.F.R. § 318.13-2(a)) issued under the Acts. A copy of the complaint and the Rules of Practice governing proceedings under the Acts were served by certified mail on respondent by the Hearing Clerk on September 21, 1988. Respondent filed an answer on October 14, 1988, admitting the material allegations contained in the complaint.

Respondent was informed in the complaint and in the letter of service that an answer that admits all the material allegations of fact made in the complaint constitutes a waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for an answer would constitute a waiver of an oral hearing.

Respondent's answer, admitting the material allegations in the complaint, constitutes a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. NOBU of Hawaii, Inc., respondent, is a business incorporated in the ate of Hawaii, with its principal place of business at 2437 South King Street, ite 213, Honolulu, Hawaii 96826.

2. On or about June 13, 1986, respondent offered for shipment to nchorage, Alaska, by a common carrier a shipment of fish, in violation of ction 318.13-2(a) of the regulations (7 C.F.R. § 318.13-2(a)), because ncealed under the fish were Japanese cucumbers that are prohibited ovement from Hawaii to the continental United States.

Conclusion

Respondent has admitted all the material allegations in the complaint. By ason of the Findings of Fact set forth above, respondent has violated the cts and the regulations issued under the Acts. Therefore, the following rder is issued.

Order

Respondent, NOBU of Hawaii, Inc., is hereby assessed a civil penalty of ree hundred seventy-five dollars ($375.00), which shall he payable to the reasurer of the United States" by certified check or money order and which nall be forwarded within thirty (30) days from the effective date of this Order USDA, APHIS Field Servicing Office, Accounting Section, Butler Square est, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403.

Respondent shall indicate on the certified check or money order that ayment is in reference to P.Q. Docket No. 88-32.

This Order shall have the same force and effect as if entered after full earing and shall be final and effective thirty-five (35) days after service f Decision and Order upon respondent, unless respondent appeals to the udicial Officer pursuant to section 1.145 of the Rules of Practice applicable this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 26, 1989.-Editor]

In re: TRIPLE OAKS NURSERY.
P.Q. Docket No. 89-2.
Decision and Order filed May 10, 1989.

Admission of material allegations - Violation of postentry quarant

Andrew W. Baker, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrativ

This is an administrative proceeding for the assess for a violation of the Plant Quarantine Act of August (7 U.S.C. §§ 151-167), and the regulations promulgate(§ 319.37 *et seq.*), hereinafter referred to as the regulati(the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* ar C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a complaint filec by the Administrator of the Animal and Plant Heal United States Department of Agriculture. This compl about September 16, 1986, the respondent violated s section 319.37-7 of the regulations (7 C.F.R. § 319.37-7 to grow, for a period of two years, a restricted (horsechesnut) imported from the Netherlands, only on in its postentry quarantine agreement.

On November 21, 1988, the respondent filed an An admitting the allegations contained in the Complaint. allegations contained in the Complaint constitutes a C.F.R. § 1.139).

Accordingly, the material allegations alleged in the and set forth herein as the Findings of Fact, and t pursuant to section 1.139 of the Rules of Practice appli((7 C.F.R. § 1.139).

Findings of Fact

1. Triple Oaks Nursery, hereinafter referred to a corporation doing business at South Delsea Drive, Fr 08322.

2. On or about September 16, 1986, the respond 319.37-7(c)(1) in that it failed to grow, for a period of article, *Aesculus* spp. (horsechesnut) imported from th the premises specified in its postentry quarantine agr

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.37-7(c)(1).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 30, 1989.-Editor]

FEDERAL MEAT INSPECTION ACT

In re: VERMONT MEAT PACKERS, INC.
FMIA Docket No. 102.
PPIA Docket No. 18.
Decision and Order filed July 1, 1988.

Withdrawal of inspection - Violation of consent decision.

Inspection services were withdrawn because respondent violated the terms of the consent decision and order by associating with a firm with which respondent's past vice president was associated. Respondent was prohibited from associating with its past vice president because he and other individuals were convicted of felonies of giving money to a public official and of aiding and abetting a federal meat inspector to receive money.

Joseph Pembroke, for Complainant.
Phillip C. Olsson, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement*

This proceeding concerns compliance with a Consent Decision and Order I entered on January 30, 1984, in FMIA Docket No. 65; PPIA Docket No. 7. The Consent Decision and Order concluded administrative proceedings to withdraw federal meat and poultry inspection services from respondent Vermont Meat Packers (Vermont) because its vice president, Steve Mintz and other individuals responsibly connected with the respondent corporation, had been convicted of the felonies of giving money to a public official in violation of 18 U.S.C. § 201 (f), and of aiding and abetting a federal meat inspector to receive money in violation of 21 U.S.C. § 622 and 18 U.S.C. § 2.

Under the terms of the Consent Decision and Order, the withdrawal of federal inspection service for an indefinite period from Vermont was held in abeyance for so long as certain express conditions were met including Steve Mintz's disassociation from Vermont, and Vermont having "no business dealings with any domestic firms with which Steve Mintz is associated as an officer, director, employee, or consultant, and which prepare, sell, or distribute meat or poultry products."

On July 23, 1986, the original complaint in this proceeding was filed. On June 1, 1987, an amended complaint was filed. The operative amended complaint was filed. The operative amended complaint requests the entry of an order activating the suspended withdrawal of inspection services from

*Editor's note: This initial decision by the Administrative Law Judge became final when the Judicial Officer filed an order (which follows this decision) allowing respondent to withdraw its appeal.

... domestic firm, Rupari Food Services, Inc., with which Steve Mintz was and is associated, in violation of the Consent Decree and Order.

Complainant and Respondent agree that Steve Mintz had and currently has, an interest in several businesses which sell meat products but do not receive USDA inspection services. These businesses include one located in North Miami Beach - Rupari Food Services, Inc. (Rupari), and four located in Canada - Mineer Foods, Ltd. (Mineer), Rigau Foods (Rigau), Seaway Distributors, Ltd. (Seaway) and Unifoods Corporation (Unifoods). John McAleer who is the president of Vermont, was and is also an officer and stockholder of Mineer, Seaway and Rupari. The parties also agree that the language of the Consent Decision and Order barred Vermont from business dealings with Rupari, the domestic company, but allowed Vermont to do business with the Canadian companies: Unifoods, Mineer, Rigau and Seaway.

The issue in this proceeding is whether Vermont had prohibited "business dealings" with Rupari under the terms of the Consent Decision and Order, arising out of: the sales of pork products by Vermont and Rupari to the same customer, Sonny's Real Pit Bar-B-Q (Sonny's), a franchised chain of 75 rib restaurants that were the result of meetings between Sonny's director of franchise operations, and the officers of both Vermont and Rupari who talked as if they represented a single entity; the employment of the same person to handle the Sonny's account for both companies; and/or the fact that the pork product sold by Rupari was first moved through Vermont's plant where required inspection was performed.

An oral hearing was held before me, on October 26-29, 1987. The place of hearing, at respondent's request was Washington, D.C. The hearing record consists of 866 pages of transcribed testimony (Tr.) from thirteen witnesses, and various exhibits introduced and marked as either Complainant's Exhibits (Cx.) or Respondent's Exhibits (Rx.).

At the end of the hearings, a briefing schedule was established which was later revised in response to requests by the parties. On May 9, 1988, as part of the reply brief, complainant for the first time filed proposed findings of fact, conclusion and order. On May 25, 1988, respondent moved to strike complainant's reply brief because it included, contrary to the established briefing schedule, proposed findings, conclusion and order and because it allegedly raised new issues. On June 23, 1988, complainant filed its opposition to respondent's Motion to Strike. Upon reviewing all briefs, respondent's motion to strike and complainant's opposition thereto, I must agree with respondent that complainant's decision to withhold its filing of proposed findings, conclusion and order, was not in keeping with the established schedule and if I had merely chose which one of two sets of findings to employ, respondent would have lost the advantages of my order for staggered briefing. However, my duties as an Administrative Law Judge under the Administrative Procedure Act require me to fashion the findings and conclusions that most accurately represent the salient evidence of record. Though this tactic by complainant is not appreciated, it has not caused

respondent any actual prejudice. Upon reviewing both sets of proposed findings, I found each set to be more argumentative than helpful and for that reason I largely rejected both. Instead, I have constructed findings that I believe better express the relevant facts under the controlling applicable standards of law. Respondent's additional stated concern that the reply brief exposes me to statements that are largely fanciful or at most argumentative rather than factual, seems to me to be more a description of a judge's normal working milieu than a sound basis for striking complainant's reply brief. Accordingly, the motion is denied.

Based upon consideration of the evidence of record, the briefs and arguments of the parties, an order is being entered withdrawing inspection services from Respondent Vermont Meat Packers for an indefinite period because respondent had business dealings with Rupari Foods Services, Inc., a domestic firm with which Steve Mintz was and is associated, in violation of the express requirement of the Consent Decision and Order I issued on January 30, 1984.

Findings of Fact

1. Respondent, Vermont Meat Packers, Inc., is a corporation which operates a meat and poultry processing establishment at Swanton, Vermont where it is the recipient of inspection services under Title I of the Federal Meat Inspection Act. The respondent corporation has been headed by John McAleer since 1984, when he became its president. Before then, its president was Gerald Puttick; its vice-president was Steve Mintz; its production manager was Isaac Bravmann, and John McAleer served as its secretary-treasurer.

2. Messrs. Puttick, Mintz and Bravmann were required to disassociate themselves from the respondent corporation under the terms of a consent decision and order that was entered on January 30, 1984. The consent decision and order was entered to settle and conclude a proceeding to withdraw federal meat and poultry inspection service from Vermont Meat Packers, Inc., arising out of the conviction of Messrs. Puttick, Mintz and Bravmann, on December 18, 1982, in the United States District Court for the District of Vermont for felonies committed in giving $100.00 to a federal meat inspector.

Steve Mintz, in particular, was found guilty of: (1) the felony of giving a gratuity (the $100) to a public official in violation of 18 U.S.C. 201 (f); (2) the felony of aiding and abetting a federal meat inspector in receiving a gratuity (the $100) in violation of 21 U.S.C. 622 and 18 U.S.C. 2; and (3) the misdemeanor of importing meat products into the United States without an inspection certificate from the exporting country in violation of 21 U.S.C. 620. Steve Mintz was imprisoned in the Lexington Correctional Center from January 18, 1983 to April 28, 1983, under the sentences imposed for those crimes.

3. Under the terms of the consent decision and order of January 30, 1984, inspection service was withdrawn for an indefinite period from Vermont Meat Packers, Inc., which, however, was held in abeyance "for so long as. . . . Respondent Vermont Meat Packers', Inc., has no business dealings with any domestic firms with which Steve Mintz is associated as an officer, director, employee, or consultant, and which prepare, sell, or distribute meat or poultry products.

4. John McAleer who now heads the respondent corporation now commutes daily to the Vermont plant from Canada, where he and Steve Mintz have mutual business interests in three Canadian businesses: Mineer Foods, Ltd. and its subsidiary, Rigau Foods, Seaway Distributors, Ltd., and Unifood Corporation. In the United States, Messrs. Mintz and McAleer are both officers and stockholders of Rupari Food Services, Inc. of Miami Beach, Florida.

5. The history of these various Canadian businesses was explained by Steve Mintz. (Tr 619-623). He started brokering poultry in Canada in the early 1970's as Universal Poultry Brokers which later became Unifood Corporation, which he still owns as sole owner. In 1973 or 1974, Steve Mintz met John McAleer who was then employed by a company importing beef from Australia and New Zealand. Together, they formed Mineer Foods, Ltd. which trades under the name Rigau Foods,[1] which they own 50-50. About three or four years later, they bought Seaway Distributors, Inc., which was involved with poultry, pork, beef and the importation of fruits and vegetables into Canada. The ownership of Seaway Distributors is divided between four men, George Douglas and Ridge Morris who operate it, and Steve Mintz and John McAleer; each of the four has a 25% ownership interest. Each of these Canadian companies strictly buy and sell products over the telephone; they engage in no processing. That's also true of Rupari Foods Services, Inc. Only Vermont operates a plant. Rupari Foods Services, Inc., is headed by Steve Mintz who is its president and owns part of its stock. John McAleer acted as Rupari's Corporate Secretary until his resignation as of a date uncertain after the entry of the Consent Decision and Order but John McAleer continues to retain a pre-existing stock interest in Rupari. Ed Pawlak is employed by Rupari as Vice-President of sales in charge of Rupari's total sales of imported meat products from Europe and Canada into the United States market.

6. The parties agree that the Consent Decision and Order's prohibition against Vermont having business dealings with any *domestic* firms with which Steve Mintz is associated, was fashioned to preclude Vermont from all business dealings with Rupari Foods Services, Inc., or other American companies owned in whole or part by Steve Mintz, while recognizing that whatever dealings Vermont might have with the Canadian businesses owned

[1]Steve Mintz explained that it is customary in Canada to employ both an English and a French name to engage in business.

wholly or partially by Steve Mintz were beyond the Department's jurisdiction and therefore not a proper subject for this restrictive provision.

7. Sonny's Real Pit Bar-B-Q is the operator of four company stores in Gainesville, Florida and a chain of 75 franchised stores in Florida and other Southern States. It buys pork collars and spareribs for its company stores and authorizes the purchase of large quantities of pork collars and pork spareribs by its franchised stores.

Its director of franchised operations is Marion Whitescarver. Mr. Whitecarver testified concerning meetings with Steve Mintz, John McAleer, and two of their associates, Frank Pully and Eddie Pawlak. I have found Mr. Whitescarver to be a most credible and trustworthy witness, and accept his account of the meetings he had with those individuals as more reliable and worthy of belief than the accounts given by Messrs. Mintz, McAleer, Pully and Pawlak.

8. Mr. Whitescarver testified that for several years prior to 1985, the Sonny's stores had obtained pork collars through Frank Pully, a broker for meat suppliers, who represented Rupari in the transactions. Sonny's pork spareribs were obtained at that time from other sources.

In 1985, Frank Pully advised Mr. Whitescarver that "he could supply Sonny's with ribs and pork products together from the same people." (Tr 89).

Because Sonny's required spareribs that were cut to its precise specifications, Mr. Pully had sample ribs prepared by Vermont which Sonny's found satisfactory.

At the end of Spring of 1985, Mr Whitescarver met in his offices with Frank Pully, Steve Mintz, John McAleer and Ed Pawlak to discuss Sonny's average weekly purchases of some 60,000 to 70,000 pounds of pork collars and 60,000 to 70,000 pounds of ribs. Frank Pully had arranged the meeting. On behalf of Sonny's, Mr. Whitescarver was trying to "get it (pork products) at a reasonable price from one supplier . . . ." (Tr. 109). At this meeting, Steve Mintz represented both Vermont and Rupari in the sale of product. (Tr. 110-111). Messrs. McAleer and Pawlak likewise represented both companies with "all three . . . talking about the same product" (Tr. 111). Both the purchases by Sonny's of pork butts and pork spareribs were "all one deal tied together. That's how the deal came about. The one made the other a better deal." (Tr. 117).

9. Frank Pully acted as a sales broker for both Vermont and Rupari on sales of product to Sonny's from the Spring of 1985 through February of 1987. During this period of time, he was paid a commission by Vermont. He sought and received from Vermont a draw against this commission at the rate of $1,500 per week. He sought a higher draw of $2,000 a week and in response to his underlying complaint that he was not being paid a sufficient amount to cover his expenses, his telephone expenses were thereafter paid by Rupari. He had been instructed by Steve Mintz to give Vermont his sales of spareribs to Sonny's rather than giving the sales to Rupari.

10. Steve Mintz and Rupari actively participated in sales of spareribs by Vermont to Sonny's:

(a) Steve Mintz called Mr. Whitescarver about pricing, and what could be done to increase sales on both collar butts (sold through Rupari) and spareribs (sold through Vermont). He represented Vermont when he called on spareribs. (Tr. 92-95).

(b) Eddie Pawlak, Rupari's Vice-President of Sales, authorized a price modification on spareribs sold to Sonny's by Vermont and that had been shipped on February 6, 1987, and delivered on February 10, 1987. (Cx 26).

(c) Sonny's distributor "IDI," received a Rupari invoice covering both pork collars and "Sonny's Spare Ribs VMP" shipped to Riveria Beach on November 5, 1986 (Cx 12).

(d) By letter dated April 18, 1986, from E. R. Pawlack Vice-President Sales, on Rupari's letterhead, Sonny's stores was thanked:

> . . . .for your support and usage of Special Trim Sonny's Spare Ribs. This product is especially trimmed and packed for Sonny's and has proved successful beyond expectations. Some of you have even stated that your yields have been up to 30% better since embarking on the program, thus resulting in higher profits. This is very good news indeed and should encourage those not currently using our Special Trim Spare Ribs to do so." (Cx 66)

Conclusion

In 1985 and 1986, Vermont Meat Packers, Inc., had business dealings with Rupari Foods Services, Inc., a domestic firm with which Steve Mintz was associated as an officer and which distributed meat products in the United States; and accordingly, Vermont Meat Packers, Inc., did not comply with the condition specified in the Consent Decision and Order of January 30, 1984, for holding in abeyance the withdrawal of federal inspection of its meat and poultry products for an indefinite period.

Discussion

Steve Mintz and John McAleer are not subject to the Department's jurisdiction when they cooperatively operate their various meat businesses in

Canada. But Vermont Meat Products, Inc. requires federal inspection for products processed in its Vermont plant for sale in the United States elsewhere than in Vermont.

When Steve Mintz and other officers of Vermont were convicted of participating in a federal meat inspector's receipt of a $100 "gratuity," they seriously impaired the confidence American consumers place in the honesty and reliability of the Department's program for assuring them wholesome meat products.

"The safety of the meat supply, and consequently the health of the consuming public, depends to a great extent on the credibility and integrity of plant owners and operators." *Apex Meat Company, Inc., v. Richard E. Lyng, per curiam*, September 16, 1987, *slip opinion*, at 6.

Though the Department could have pressed for unconditional withdrawal of inspection services from the respondent plant, it entered instead into a consent decision which held withdrawal in abeyance subject to several conditions. One was that the company have no business dealings with any domestic firm selling meat products for which Steve Mintz was an officer or employee.

It is unquestioned that Steve Mintz is an officer of Rupari Foods Services, Inc., a domestic firm selling meat products in the United States, to various outlets and in particular to Sonny's Real Pit Bar-B-Q stores in Florida, Georgia and South Carolina.

The only real issue is whether Rupari and Vermont through their respective officers and agents, had "business dealings."

Of course they did!

The two companies employed the same sales representative to service an identical customer taking the bulk of their pork products.

Moreover, Steve Mintz helped put the deal together. He met with Sonny's director of franchised sales. He discussed pricing problems and ways in which to increase sales of both Rupari's products and Vermont's in his telephone conversations with Sonny's franchised sales director.

We know this to be so because Sonny's Director of franchised sales, Marion Whitescarver, so testified under oath. He is a credible witness. Respondent has attempted to discredit him as a long-time friend of Frank Pully, who was upset by the way Pully had been treated by McAleer and Mintz. I don't believe that circumstance influenced his testimony.

Nor have I found opposite testimony given on respondent's behalf to be more credible, coming as it did from a convicted felon, his business partners, and their employees and agents.

Inasmuch as Frank Pully's written statement to the investigator was unsworn and he retracted it when placed on the witness stand, it has not been used as the basis for these findings and conclusions. But I must say that I have never encountered any two more blazen, outrageous witnesses than Frank Pully and his brother Robert. Both, undoubtedly to gain some anticipated business advantage with Steve Mintz and associates, publicly

denounced Frank's statement to the investigator as the contrivance of an angry man seeking revenge and personal gain. Its hard to believe that anyone would take the stand and proclaim himself to be a liar. Its even harder to believe that one's own brother would profess, "I love my brother," (Tr. 661); and yet relate that he had once advised an industry member who asked about his brother's character, "I told him he was the rottenest, sneakingest, lie, cheat, steal. . . ." (Tr. 659).

Once the testimony of an admitted liar, a felon and those with self-serving interests is eliminated from consideration, we are left with the testimony of one credible eyewitness to crucial meetings and conversations --- Mr. Marion Whitescarver. His testimony, as corroborated by the documents identified in the findings, makes it clear that Steve Mintz both personally and through his company, Rupari Foods, continued to represent and advance the interests of Vermont Meats after my issuance of the Consent Decision and Order, which forbade such activities.

In accordance with the holding in *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975), evidence was received on the circumstances surrounding the formation of the Consent Decision and Order, and one of respondent's attorneys testified that there was no intent to preclude the transfer of product between Vermont and Rupari when one of the Canadian firms was used as an intermediary. Accepting this interpretation, this Decision and Order has excluded from consideration the transactions respondent's attorney described as outside the contemplation of the parties. The findings and this discussion have been deliberately limited to those direct activities by officers and employees of Rupari in selling Vermont's spareribs for Vermont's account. Those activities were in clear violation of the plain meaning of an express condition "within the four corners" of the Consent Decision and Order. *See United States v. Armour & Co.*, 402 U.S. 673 at 682 (1971). That express condition required that respondent have "no business dealings" with Rupari, a domestic firm headed by Steve Mintz. But as shown, it did.

For these reasons, the withdrawal of federal meat and poultry inspection that has been so far held in abeyance, shall be effectuated.

Accordingly, the following Order is issued.

Order

It is hereby ordered that in conformity with the Consent Decision and Order entered on January 30, 1984, in FMIA Docket No. 65, PPIA Docket No. 7, federal meat and poultry inspection services are withdrawn for an indefinite period from Respondent Vermont Meat Packers, Inc., and all of its affiliates, subsidiaries, successors and assigns.

This Order shall become effective thirty five days after its service upon the parties, provided that an appeal is not filed within thirty days hereof, to the Judicial Officer.

In re: VERMONT MEAT PACKERS, INC.
FMIA Docket No. 102.
PPIA Docket No. 18.
Order Permitting Withdrawal of Appeal filed March 8, 1989.

Order issued by Donald A. Campbell, Judicial Officer.

On February 24, 1989, respondent filed a document withdrawing its appeal with prejudice. Withdrawal of an appeal is not a matter of right. *In re Shatkin*, 34 Agric. Dec. 296, 297 (1975). However, there is no reason not to permit respondent to withdraw its appeal.

Order

Respondent's appeal is withdrawn with prejudice. The Order previously filed in this case shall become effective on the day after service of this order on respondent.

In re: TWO COUNTRIES CITY DRESSED ABATTOIR PACKING CORP.
FMIA Docket No. 84.
Decision and Order filed January 19, 1989.

Withdrawal of inspection - Violation of consent decision.

Lori Ben McClave-Monfort and Hal Reuben, for Complainant.
Edward G.O'Byrne, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

This proceeding concerns compliance with a Stipulation, Consent Decision and Order entered on December 23, 1987 in FMIA Docket No. 84. The Stipulation, Decision and Order concluded administrative proceedings to withdraw federal meat inspection service from the corporate respondent for failure to comply with the terms of an Amended Stipulation, Consent Decision and Order entered by Administrative Law Judge William J. Weber on September 25, 1984, in FMIA Docket No. 73.

Under the terms of the Stipulation, Consent Decision and Order of December 23, 1987, the withdrawal from respondent, for an indefinite period, of federal meat inspection service under Subchapter I of the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) was held in abeyance for so long as respondent complied with certain conditions, which include restrictions on its business dealings with Frank Atanasio, who formerly headed the corporate respondent. It further provided for summary withdrawal of inspection upon a written determination by the Food Safety and Inspection Service (FSIS) that

Respondent's successor, Superior Abattoir Corp., failed to take reasonable steps to prevent a violation of the order.

On November 2, 1988, the Administrator of the FSIS informed Superior Abattoir Corp. by letter that federal meat inspection service was summarily withdrawn from it for an indefinite period to commence on November 11, 1988, based upon a determination that Superior's business dealings with Frank Atanasio had violated the terms of the Stipulation, Consent Decision and Order of December 23, 1987. The letter also advised Superior of its right to request an expedited hearing on the violations.

A hearing was held before me on December 13, 1988, in New York, NY. Lori Ben McClave-Monfort and Hal Reuben, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., appeared for the Complainant. Edward G. O'Byrne, 205 Highway 46, Totowa, N.J., appeared for the Respondent.

Briefing was completed on December 23, 1988, when the parties submitted proposed findings of fact and conclusions of law. All proposed findings, conclusions and arguments have been considered. To the extent they are incorporated as part of this decision, they have been adopted. Otherwise the proposed findings, conclusions and arguments have been rejected as irrelevant, immaterial or lacking legal or evidentiary basis.

Based upon the findings and conclusions which follow, an order is being entered activating the withdrawal of federal meat inspection services from respondent Superior Abattoir Corp. heretofore held in abeyance under the Stipulation, Consent Decision and Order of December 23, 1987.

Findings of Fact

1. Respondent, Two Countries City Dressed Abattoir Packing Corp. (hereinafter "Two Countries"), operated a meat processing establishment at 240 East 5th Street, Paterson, NJ 07524.

2. As of April 22, 1983, Two Countries was the recipient of inspection services at this address under Subchapter I of the Federal Meat Inspection Act (FMIA).

3. As of April 22, 1983, Frank Atanasio was responsibly connected with Two Countries as owner and operator.

4. On April 22, 1983, Frank Atanasio was convicted in the United States District Court for the District of New Jersey of two misdemeanors for a) knowingly and unlawfully failing to destroy carcasses of lamb stamped "U.S. Inspected and Condemned", in violation of sections 4 and 406(a) of the FMIA (21 U.S.C. §§ 604, 676(a); and b) knowingly and willfully preparing for use as human food adulterated lamb forequarters stamped "U.S. Inspected and Condemned", in violation of sections 10(a) and 406(a) of the FMIA (21 U.S.C. §§ 610(a), 676(a)).

5. The two misdemeanor convictions were affirmed by Judge Dickinson R. Debevoise of the United States District Court for the District of New Jersey on September 15, 1983.

6. On August 29, 1983, a complaint was filed, pursuant to section 401 of the FMIA (21 U.S.C. § 671), by the Administrator of the FSIS, seeking the withdrawal from Two Countries of inspection services under Subchapter I of the FMIA based upon the misdemeanor convictions of Frank Atanasio.

7. On September 25, 1984, Administrative Law Judge William J. Weber issued an Amended Stipulation, Consent Decision and Order in FMIA Docket No. 73, withdrawing inspection for an indefinite period from Two Countries and all affiliates, subsidiaries, successors and assigns. However, the withdrawal of inspection was held in abeyance for so long as certain requirements were met. Among these were a) that Frank Atanasio physically remove himself from Respondent's premises by November 15, 1984 and not enter upon the premises thereafter; and b) that Frank Atanasio divest himself of all financial interest in Respondent, including participation as a shareholder, officer, director, employee or consultant, by January 15, 1985.

8. As of November 15, 1984, Frank Atanasio had physically removed himself from Two Countries' premises. He re-entered the premises in June, 1987, with Complainant's consent.

9. As of January 15, 1985, Frank Atanasio had not fully divested himself of his financial interest in Respondent, as required by the Amended Stipulation, Consent Decision and Order of September 25, 1984.

10. On February 5, 1985, a complaint was filed, pursuant to section 401 of the FMIA (21 U.S.C. § 671), by the Administrator of FSIS, seeking the withdrawal from Respondent of inspection services under Subchapter I of the FMIA based upon the failure of Frank Atanasio to divest himself of his financial interest in Respondent.

11. As of January 15, 1985, Frank Atanasio and his wife, Maria Atanasio, had entered into a contract of sale with one Morris Zakheim to divest themselves of all financial interest in Respondent in a good faith effort to comply with Consent Decision I. This contract was not consummated. However, as of January 15, 1985, Morris Zakheim and a corporation he formed known as Bedford Packing Corp. assumed complete possession and control of Respondent's meat processing business. As a result, Frank Atanasio exercised no control over, and realized no financial benefit from, the meat processing business operated by Bedford Packing Corp. from January 15, 1985 through April 1987.

12. On December 23, 1987, a Stipulation, Consent Decision and Order was issued in FMIA Docket No. 84, withdrawing inspection for an indefinite period from Respondent, its owners, officers, directors, partners, affiliates, successors and assigns, directly or through any corporate device.

13. As of December 23, 1987, Superior Abattoir Packing (Superior), successor to Respondent, was a firm operating the meat processing establishment at 250 East 5th Street, Paterson, New Jersey 07524, and was

an applicant for inspection services under Subchapter 1 of the FMIA at this address.

14. The Stipulation, Consent Decision and Order of December 23, 1987 was agreed to and signed by Frank Atanasio for Two Countries and by Stephen Galoppa for Superior. Agency personnel further discussed the terms of the order with Superior officials on or about January 26, 1988 and on April 12, 1988, in accordance with agency procedure for ensuring compliance with consent decisions.

15. The withdrawal of inspection service from Respondent and its successor, Superior, as set forth in the Stipulation, Consent Decision and Order of December 23, 1987, was suspended and held in abeyance for so long as Superior complied with certain conditions. The Stipulation, Consent Decision and Order states, in pertinent part, that "Superior Abattoir Packing shall have no business dealings whatsoever with Frank Atanasio; provided, however, that Frank Atanasio may purchase livestock for Superior Abattoir Packing for the initial three month period of its operation." The Stipulation, Consent Decision and Order further provides that FSIS may summarily withdraw inspection services from Superior, for an indefinite period, upon a written determination by the Assistant Deputy Administrator that Superior failed to take reasonable steps to prevent a violation of the order.

16. Superior was formally granted inspection service on January 5, 1988. However, inspection service was actually instituted on December 21, 1987.

17. The initial three month period of Superior's operation began on January 5, 1988, and ended on April 5, 1988.

18. On or about April 9, 1988, Mr. Atanasio spoke with Abrekzuar Laypan, the owner and operator of South Paterson Halal Meat Market, and offered to sell him 51 lamb carcasses. On or about April 9, 1988, the carcasses were delivered to South Paterson Halal Meat Market in a van driven by an employee of Superior.

19. On April 10, 1988, Mr. Laypan gave Mr. Atanasio a blank check in payment for the 51 lamb carcasses. Mr. Atanasio wrote the amount agreed upon and made the instrument payable to "Superior Abattoir." The check was subsequently indorsed "For deposit only Superior Abattoir Corp."

20. On or about April 19, 1988, Frank Atanasio spoke with Abrekzuar Laypan and offered to sell him live animals, which Mr. Laypan would then personally slaughter at Superior. Mr. Laypan went to Superior, selected 55 lambs, 3 bulls and 3 calves, and slaughtered them. Employees of Superior dressed the carcasses.

21. On April 25, 1988, Mr. Laypan's wife gave Frank Atanasio a check in payment for the livestock slaughtered on April 19. The check was made payable to, and was indorsed by, Frank Atanasio. The check also noted that payment was for "Lambs 55 Bull 3 Calf 3 4/19/99."

22. Mr. Atanasio gave Mr. Laypan a handwritten receipt showing the sale of 48 lambs and 7 sheep, 2 bulls and 1 steer, and 3 calves to South Paterson Halal Meat Market on April 19, 1988. The receipt was dated April 18, 1988,

and was signed by Mr. Atanasio. The transaction is documented in Superior's records as a sale by Superior to South Paterson Halal Meat Market on April 19, 1988.

23. On or about April 20, 1988, Frank Atanasio spoke with Ibrahim Tekeoglu, the owner and operator of Manhattan Halal Meat Market, and offered live animals for sale. Mr. Tekeoglu went to Superior, selected 10 lambs, 1 bull and 1 goat, and slaughtered them. Employees of Superior dressed the carcasses. Mr. Atanasio later gave Mr. Laypan a handwritten receipt, dated April 22, 1988, showing the sale to Manhattan Halal Meat Market of 11 lambs, 1 bull, 1 goat and 1 calf. This transaction is documented in Superior's records as a sale by Superior to Manhattan Halal Meat Market of 10 lambs and 1 bull on April 20, 1988. The discrepancy between Superior's records and the handwritten receipt is apparently the result of Mr. Atanasio's (incorrect) assumption that Mr. Tekeoglu would purchase all of the animals which he was offered.

24. On May 3, 1988, Mr. Tekeoglu gave Mr. Atanasio a blank check in payment for the 10 lambs and 1 bull which Mr. Tekeoglu had actually purchased in the April 20, 1988, transaction. Mr. Atanasio wrote an amount and made the check payable to himself. Mr. Tekeoglu disputed the amount and therefore did not sign the check.

25. On April 13, 1988, Mr. Atanasio, buying under the code name "JP", purchased livestock in the amount of $1,395.85 at Orange Livestock Market, Orange, VA. The records of Orange Livestock Market document the transaction as a sale to Superior.

26. Mr. Atanasio paid for the animals with a bank check in the amount of $5,000, which bore the name "Superior Abattoir Corp." Mr. Atanasio was reimbursed for the difference between the purchase price of the animals and the amount of the bank check with an Orange Livestock Market check made payable to "Superior Abattoir Corp." and "Frank Atanasio."

27. On or about April 20, 1988, Sonny Mowry, a bonded livestock dealer in Petersburg, W.VA, assembled a load of livestock for Mr. Atanasio at the request of one Donald Michael. Mr. Mowry's truck driver delivered the livestock to a location in Paterson, NJ. At the time of delivery, the driver was paid with two bank checks in the amounts of $5,000 and $10,000 and a Superior Abattoir Corp. check payable to Donald Michael. Mr. Mowry subsequently refused to accept the Superior Abattoir Corp. check and sent his driver back to Paterson, NJ to retrieve 34 calves. Superior's records indicate that 34 calves were returned by Frank Atanasio on April 26, 1988.

Conclusion

In permitting Frank Atanasio to purchase and sell carcasses and livestock on its behalf, Superior had business dealings with Mr. Atanasio. The scope and duration of the business dealings between Superior and Mr. Atanasio exceeded the very limited contacts specified in the Stipulation, Consent

Decision and Order of December 23, 1987. Therefore, Superior failed to comply with the conditions of the Stipulation, Consent Decision and Order for holding in abeyance the withdrawal of inspection service for an indefinite period.

Discussion

The initial action in this matter was brought under section 401 of the FMIA (21 U.S.C. § 671), based upon Frank Atanasio's conviction of two misdemeanors involving intent to sell condemned meat.

Section 401 is the expression of a Congressional finding that participation in the meat industry by persons convicted of certain types of offenses creates a risk of danger to the public health. *Utica Packing Co. v. Bergland*, 511 F. Supp. 655, 661 (E.D. Mich. 1981), *rev'd on other grounds*, 705 F. 2d 460 (6th Cir. 1982). Accordingly, the policy of the Department has been to offer a corporation with such an officer or employee, the choice of severing all ties with this person, or suffering the withdrawal of inspection service. *See In re Great American Veal Co.*, 45 Agric. Dec. 1770 (1986).

The Stipulation, Consent Decision and Order of December 23, 1987, followed the Department's policy of allowing the corporate respondent a three month period in which to correct its unfitness to receive inspection service by severing all operational ties with Frank Atanasio. Three months is generally considered sufficient to permit an orderly transition to a successor.

Mr. Atanasio was convicted of crimes which strike at the heart of the federal meat inspection program, and the condition that Superior restrict Mr. Atanasio's transition period activities on its behalf to the purchase of livestock was a reasonable and appropriate response. This restriction was necessary to assure the public of the program's integrity and to remove the consequent dangers posed by in Mr. Atanasio's continued involvement in Superior's operations.

Since the sole objective of allowing Mr. Atanasio to continue his participation in Superior's business was to facilitate the training of a new livestock buyer, it was intended that the limits on the scope and duration of Mr. Atanasio's activities would be strictly observed.

The evidence in this proceeding shows that Superior failed to limit Mr. Atanasio's activities to "buying livestock" on its behalf during the first three months of its operations. Instead, he helped *sell* livestock to Abrekzuar Laypan and Ibrahim Tekcoglu. Moreover, the sales were made after April 5, 1988, the date when Superior's initial three month period of operations were unquestionably concluded.

The purchases of livestock by Mr. Atanasio from Orange Livestock Market and Sonny Mowry also occurred after April 5, 1988, and were likewise violative of the Stipulation, Consent Decision and Order.

The summary withdrawal of inspection service from Superior was based upon a determination by FSIS that Superior had failed to take reasonable

steps to prevent violations of the Stipulation, Consent Decision and Order. This determination is fully supported by the evidence. In the transactions involving Messrs. Laypan and Tekeoglu, Frank Atanasio personally received checks in payment and made them payable to Superior in one instance and to himself in the other. These transactions are documented in Superior's records as sales by Superior. Superior was aware of Mr. Atanasio's participation.

Superior also knew that Mr. Atanasio made purchases from Orange Livestock Market and Sonny Mowry. Mr. Atanasio paid for the livestock from Orange with a bank check bearing the name of Superior Abattoir Corp., and Orange's records characterize the transaction as a sale to Superior. The livestock purchased from Sonny Mowry was delivered to an unascertained location in Paterson, N.J. -- which is likely to have been Superior's premises -- and paid for in part with a Superior check. Superior's records show a subsequent return of part of this shipment from its premises by Frank Atanasio. Although the nature of the transactions with Orange Livestock Market and Sonny Mowry is not completely clear, the participation of both Superior and Mr. Atanasio is apparent. Therefore, they too, were business dealings prohibited by the Stipulation, Consent Decision and Order, which Superior could reasonably have avoided.

Although the evidence presented by complainant provide full and sufficient support for the findings made in this case, these findings are reinforced by respondent's failure to produce any evidence in response to the Department's allegations. The lack of testimonial evidence in rebuttal gives rise to the inference that such evidence would have been adverse to respondent's position. *In re Apex Meat Co.*, 44 Agric. Dec. 1855, 1872-1873 (1985), *aff'd*, No. 85-3189 (D.D.C. 1986), *aff'd*, C.A. No. 85-3159 (D.C. Cir. 1987); *In re James Grady, Patrick J. Grady and Rasemary Grady*, 45 Agric. Dec. 66, 107-109 (1986).

In attacking the summary withdrawal of inspection, respondent argues that it should have been given the opportunity to correct the defects in its compliance with the Stipulation, Consent Decision and Order. Given the protracted nature of the proceedings in this matter and the Department's repeated efforts to allow respondent to correct deficiencies while continuing its business under federal inspection, this argument is not well taken.

Absent extraordinary circumstances, voluntary settlements reached in administrative proceedings should be enforced. *In re Indiana Slaughtering Co., Inc.*, 35 Agric. Dec. 1822, 1827 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. 1977). Respondent has failed to produce evidence of circumstances sufficient to show that the terms of the Stipulation, Consent Decision and Order providing for summary withdrawal should not be enforced.

Respondent's argument against an indefinite period of withdrawal is also without merit. Respondent contends that the violations at issue in this matter have "long since ceased" and that withdrawal is therefore "unfair and unjust".

Evidence that the establishment in question is not *currently* in violation of the FMIA is of no relevance in a proceeding under section 401 based upon convictions of a responsibly connected person. In enacting section 401, "[C]ongress intended to add new and different grounds for withdrawal of inspection. . .and in doing so to explicitly limit the scope of ensuing administrative considerations to questions of unfitness arising from criminal convictions and no others." *Utica Packing Co. v. Bergland,* 511 F. Supp. at 659. *See also Utica Packing Co. v. Block,* 781 F.2d 71, 78-79 (6th Cir. 1986).

This policy is equally applicable to proceedings involving compliance with the terms of administrative settlements reached in section 401 matters. In the instant case, consideration of the fact of present compliance with the Stipulation, Consent Decision and Order "would not be conducive to achieving the purposes of the remedial legislation [section 401] and, therefore, would not be in the public interest." *In re Indiana Slaughtering Co., Inc.* 35 Agric. Dec. at 1831.

Under section 401, the duration of withdrawal necessary to effectuate the purposes of the FMIA is properly determined by considering the elements of the crimes committed, to the exclusion of factors relevant to withdrawal of inspection under other sections of the FMIA. *Id.* at 661. Although mitigating circumstances must be considered, "[t]he more closely the conduct strikes at the policies of the Act, the more likely [that] it alone will support a determination of unfitness". *Wyszynski Provision Co. v. Secretary of Agriculture,* 538 F. Supp. 361, 364 (E.D. Pa. 1982).

Consideration of the elements of Mr. Atanasio's offenses, as well as the lack of mitigating circumstances, yields a conclusion identical to that which formed the basis for the consent order; namely, that Superior is unfit to receive federal meat inspection service within the meaning of section 401 unless a complete and lasting separation from Frank Atanasio is achieved. By failing to sever all ties with Mr. Atanasio within the first three months of its operation, Superior demonstrated unwillingness to correct this unfitness. Moreover, evidence adduced in this proceeding suggests that Superior may be unwilling to maintain its distance from Mr. Atanasio in the future.

The sanction of withdrawal of inspection under section 401 for an indefinite period is based not upon the need to punish, but the need to protect the public health and deter potential violators. *In re Apex Meat Co.,* 46 Agric. Dec. 5, 9 (1984); *In re Wyszynski Provision Co.,* 40 Agric. Dec. 17, 26 (1981), *aff'd sub nom. Wyszynski Provision Co. v. Secretary of Agriculture,* 538 F. Supp. 361 (E.D. Pa. 1982).

This rationale must also guide the enforcement of administrative settlements reached in proceedings under section 401. Suspension for an indefinite period in this case is necessary to protect the meat supply, to maintain public confidence in the Department's ability to do so and to deter other members of the industry from violating the FMIA. Respondent has produced no evidence sufficient to overcome these policy considerations or to

show that withdrawal of inspection for an indefinite period was otherwise inappropriate on December 23, 1987 or is so at this time.

Order

In accordance with the provisions of the Stipulation, Consent Decision and Order entered on December 23, 1987 in FMIA Docket No. 84, withdrawal of inspection service under Subchapter I of the Federal Meat Inspection Act from Superior Abattoir Corp., its owners, officers, directors, partners, affiliates, successors and assigns, is hereby activated. The summary withdrawal of inspection announced in the Notice of November 1, 1988 is hereby sustained and shall remain in effect for an indefinite period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service.

Copies hereof shall be served upon the parties.

[This decision and order became final March 6, 1989.-Editor]

In re: LINCOLN MEAT CO., INC. AND LINCOLN PROVISION, INC.
FMIA Docket No. 88-12. I&G Docket No. 88-3.
Ruling on Certified Question filed June 30, 1989.

Joseph P. Pembroke and Sheila H. Novak, for Complainant.
Michael B. Brahman and Thomas R Mulroy, Jr., for Respondents.
Ruling on Certified Question issued by Donald A. Campbell, Judicial Officer.

On June 28, 1989, Administrative Law Judge Dorothea A. Baker certified to the Judicial Officer the following question:

> The extent, if any, the Complainant should be compelled to produce documents in its file which are sought by Respondents through their Motion to Compel.

The Rules of Practice do not provide for discovery. For the reasons set forth in Complainaot's Response to Respondent's Motion, complainant should not be compelled to produce any documents.

CONSENT DECISIONS

(Not published herein.-Editor)

ANIMAL QUARANTINE AND RELATED LAWS

Jerard K. Allen. A.Q. Docket No. 88-2. 2/6/89.

George Harold Maxey. A.Q. Docket No. 89-7. 2/14/89.

Robert Parchman and Paris Livestock Sales. A.Q. Docket No. 89-10. 2/24/89.

J. R. "Johnny" Vince. A.Q. Docket No. 88-25. 2/24/89.

Sam Hubbert. A.Q. Docket No. 89-11. 3/8/89.

Ferrell Spicer. A.Q. Docket No. 89-9. 3/9/89.

Howard Meyers. A.Q. Docket No. 89-12. 3/13/89.

Ernest Mendel, d/b/a Redfield Farms Inc.; Hugh McGovern, d/b/a McGovern Farms, Inc., Phillip Zimmerman, d/b/a C. P. Zimmerman and Sons, Inc.; and Donald Hartwell, d/b/a Don Hartwell Trucking. A.Q. Docket No. 88-14. 3/20/89.

Jerry Raucher. A.Q. Docket No. 89-8. 5/10/89.

Meridian Order Buyers, Inc., and Darrell Denney. A.Q. Docket No. 89-24. 6/23/89.

Gerald Lanier. A.Q. Docket No. 89-04. 6/23/89.

ANIMAL WELFARE ACT

Joseph G. Wortley, Jr., d/b/a Liberty Laboratories. AWA Docket No. 377. 2/3/89.

All Pets, Inc. AWA Docket No 88-12. 2/14/89.

Edna Depew. AWA Docket No. 88-18. 3/8/89.

Fred and Margie Bauer. AWA Dockct No. 88-11. 4/3/89.

Nancy Hutcherson. AWA Docket No. 88-13. 4/4/89.

Richard J. Garden and Frank Buck Bring 'em Back Alive, Inc. AWA Docket No. 88-10. 5/2/89.

City of Bridgeport, Connecticut. AWA Docket No. 398. 5/17/89.

HORSE PROTECTION ACT

Frank Colombo. HPA Dockct No. 88-56. 1/9/89.

Rebccca Helm. HPA Docket No. 88-21. 1/10/89.

Jerry Hoskins and Buddy Dick. HPA Docket No. 88-43. 1/13/89.

Kenny L. Gilmore and Richard O. Parish. HPA Docket No. 88-49. 1/13/89.

Kenny L. Gilmore and Richard O. Parish. HPA Docket No. 88-49. 1/13/89.

PauL Priamos and Billy Gray. HPA Docket No. 88-46. 1/18/89.

Harold D. Civils. HPA Dockct No. 88-45. 1/18/89.

Barbara E. Lane and Ken Moore. HPA Dockct No. 88-30. 1/23/89.

Billy Carrigan. HPA Docket No. 88-51. 1/23/89.

Jerry Hoskins and Buddy Dick. HPA Docket No. 88-43. 1/24/89.

C. A. Grecn and Frank Thornton. HPA Docket No. 88-10. 2/3/89.

Carl Markum, Tommy Howell, and David Dupes. HPA Docket No. 88-41. 2/3/89.

Carlton Pitts and Lytle Earl (Buddy) Fann. HPA 88-59. 2/6/89.

Wayne H. Smith and Doug Turner. HPA Docket No. 88-34. 2/13/89.

Jim Landers and Jack Kinkade. HPA Docket No. 88-16. 3/8/89.

Robert Hauk and David Polk. HPA Docket No. 88-42. 3/9/89.

Carl Markum, Tommy Howell, and David Dupes. HPA Docket No. 88-41. 3/10/89.

Robert Hauk and David Polk. HPA Docket No. 88-42. 4/5/89.

Frank Witherspoon, Buford Brewer, Robert Carl Brewer, and James Finney. HPA Docket No. 88-27. 5/1/89.

PLANT QUARANTINE ACT

Dobbs House, Inc. P.Q. Docket No. 88-22. 2/3/89.

Adel M. Sumagui. P.Q. Docket No. 88-40. 2/6/89.

Roslyn Magdelene Phillip. P.Q. Docket No. 88-5. 2/15/89.

Lee Ann Woolpert and Continental Airlines. P.Q. Docket No. 89-01. 2/24/89.

Narrator Marine Company Limited. P.Q. Docket No. 89-06. 3/3/89.

F & F Pest Control, Inc. P.Q. Docket No. 89-8. 3/9/89.

Ogden Allied Aviation Services. P.Q. Docket No. 88-6. 3/20/89.

Iberia Airlines and Hotel Laconcha. P.Q. Docket No. 89-16. 4/5/89.

Staff Sergeant (SSG) Keith W. Henderson and Airman First Class (A1C) Cornell L. Cook. P.Q. Docket No. 344. 4/20/89.

Marriott Catering Service, Viriyak Sip, Scandinavian Airlines (SAS), and Max Jensen. P.Q. Docket No. 89-17. 5/4/89.

Marriott Catering Service, Viriyak Sip, Scandinavian Airlines (SAS), and Max Jensen. P.Q. Docket No. 89-17. 6/26/89.

FEDERAL MEAT INSPECTION ACT

Eisen Sausage Company. FMIA Docket No. 88-8. 3/23/89.

P & N Packing Company. FMIA Docket No. 89-2. 3/24/89.

Federal Beef Processor's Inc. FMIA Docket No. 88-2. 6/9/89.

GRAIN STANDARDS ACT

Douglas Peanut & Grain Company. GSA Docket No. 89-1. 4/21/89.

JANUARY - JUNE 1989